92-1665

No. ——

Supreme Court, U.S.
FILED
APR 16 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MAPCO AMMONIA PIPELINE, INC., *et al.*,
Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

JOEL I. KLEIN
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

WILLIAM R. JOHNSON
(Counsel of Record)
KENNEDY, HOLLAND, DELACY & SVOBODA
10306 Regency Parkway Drive
Omaha, NE 68114
(402) 397-0203

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a remedy for a discriminatory property tax that does not retroactively equalize the positions of favored and disfavored taxpayers violates the due process principles set forth in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

PARTIES TO THE PROCEEDINGS

Petitioners are:

1. MAPCO Ammonia Pipeline, Inc.
2. Mid-America Pipeline Co.
3. Trailblazer Pipeline Co.
4. Natural Gas Pipeline Co. of America [1]

Respondents are:

1. Nebraska Board of Equalization and Assessment
2. League of Nebraska Municipalities
3. Gage County, Nebraska
4. City of Beatrice, Nebraska
5. City of Lincoln, Nebraska
6. City of Omaha, Nebraska
7. City of Fremont, Nebraska
8. City of Norfolk, Nebraska
9. City of LaVista, Nebraska
10. City of Papillion, Nebraska

---

[1] Pursuant to Rule 29.1, each petitioner provides the following information: (1) MAPCO Ammonia Pipeline, Inc. and (2) Mid-America Pipeline Co. are ultimately owned, through an intervening wholly owned subsidiary, by MAPCO, Inc.; (3) Trailblazer Pipeline Co. is a general partnership owned by (a) NGPL-Trailblazer, Inc., which is ultimately owned, through intervening wholly owned subsidiaries, by Occidental Petroleum Corporation, (b) Columbia Gulf Transmission Co., which is ultimately owned, through intervening wholly owned subsidiaries, by the Columbia Gas System, and (c) Enron Trailblazer Pipeline Co., which is ultimately owned, through intervening wholly owned subsidiaries, by Enron Gas Pipeline Co. of America; and (4) Natural Gas Pipeline Co. of America is ultimately owned, through wholly owned subsidiaries, by Occidental Petroleum Corporation. No petitioner has any non-wholly owned subsidiaries.

11. School #1 Dodge County-Fremont Public Schools
12. School District #66 Douglas County-Westside Community Schools
13. School District #2 Hall County-Grand Island Public Schools
14. School District #145 Lancaster County-Waverly Public Schools
15. School District #2 Madison County-Norfolk Public Schools
16. School District #1 Platte County-Columbus Public Schools
17. District #27 Sarpy County-Papillion-LaVista Public Schools
18. School District #17 Douglas County-Millard Public Schools
19. School District #15 Gage County-Beatrice Public Schools
20. Otoe County School District #501-Palmyra-Bennett OR #1
21. School District #001-Lancaster County-Lincoln Public Schools
22. School District #18 Adams County-Hastings Public Schools
23. School District #20 Burt County-Lyons-Decature Northeast Public Schools
24. School District #22 Cass County-Weeping Water Public Schools
25. School District #30 Gage County-Adams Public Schools
26. School District #300 Jefferson County-Tri County Public Schools

27. School District #148 Lancaster County-Malcolm Public Schools
28. School District #160 Lancaster County-Norris Public Schools
29. School District #55 Lincoln County-Sutherland Public Schools
30. School District #1 Washington County-Blair Public Schools
31. School District #1 Lincoln County-North Platte Public Schools
32. School District #1 Cheyene County-Sidney Public Schools
33. School District #2 Dawes Public Schools
34. School District #1 Kimball County-Kimball Public Schools
35. School District #1 Sarpy County-Bellevue Public Schools
36. School District #32 Scottsbluff County-Scottsbluff Public Schools

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
1. Background Proceedings	2
2. Remedy Proceedings	4
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: Page

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) ..... *passim*
Natural Gas Pipeline Co. v. State Bd. of Equalization, 466 N.W.2d 461 (Neb. 1991) 3
Northern Natural Gas Co. v. State Bd. of Equalization, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990) 3, 10
Sioux City Bridge Co. v. Dakota County, Neb., 260 U.S. 441 (1923) 9
Smith v. Travis County Educ. Dist., 791 F. Supp. 1170 (W.D. Tex.), *vacated on other grounds*, 968 F.2d 453 (5th Cir. 1992) 9
Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 10
Thayer v. South Carolina Tax Comm'n, 413 S.E.2d 810 (S.C. 1992) 10, 11
Trailer Train Co. v. Leuenberger, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) 3

Constitutional & Statutory Provisions:

Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503(b)(4) (1992) 3
Nebraska Const. art. VIII, § 1 2
Neb. Rev. Stat. § 77-201 (Reissue 1990) 2
§ 77-202(11) (Reissue 1990) 3
§ 77-1726 (Reissue 1990) 2, 8
§ 77-1727 (Reissue 1990) 2, 8
§ 77-1736.06 (1992 Cum. Supp.) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ———

MAPCO AMMONIA PIPELINE, INC., *et al.*,
Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Nebraska Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Nebraska Supreme Court is reported at 494 N.W.2d 535 (1993) and reprinted in the Appendix (Pet. App.) at 1a-12a. The opinion of the State Board of Equalization and Assessment was issued orally and a transcription thereof is reprinted at Pet. App. 13a-19a. An earlier opinion of the Nebraska Supreme Court in the same case is reported at 471 N.W.2d 734 (1991) and reprinted at Pet. App. 20a-52a.

JURISDICTION

The judgment of the Nebraska Supreme Court was issued on January 22, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case involves a clear-cut misapplication of the decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). The Nebraska Supreme Court, having found that petitioners were compelled to pay an unlawful, discriminatory property tax, went on to rule that the State could remedy this violation by giving petitioners a 19 percent refund, representing the amount that their taxes would have been reduced if the impermissibly exempted property had instead been taxed and had thereby contributed to the overall property tax base. Because the discriminatory exemptions were left in place, however, this result did not retroactively equalize the tax burden on petitioners with the burden on the exempted taxpayers. Absent such equalization, as *McKesson* expressly holds, petitioners have not been accorded a "fully adequate" constitutional remedy. *Id.* at 41.

1. *Background Proceedings.* Petitioners are four interstate pipelines operating in Nebraska. In 1990, the tax year here in dispute, petitioners paid their property taxes pursuant to Neb. Rev. Stat. § 77-201 (Reissue 1990). As required by Nebraska law (*id.*, §§ 77-1726-1727), petitioners paid these taxes under compulsion and then sought refunds on the ground that the tax unlawfully discriminated against them because property taxes were not imposed on comparable property, including railroad property that had been statutorily exempted. Petitioners rested their claim on both the uniformity clause of the Nebraska Constitution, art. VIII, § 1, and the equal protection clause of the Fourteenth Amendment.

In an earlier case, *Natural Gas Pipeline Co. v. State Bd. of Equalization*, 466 N.W.2d 461 (Neb. 1991), the Nebraska Supreme Court had already upheld petitioners' state constitutional claim with respect to the 1989 tax year. The court ruled that "[t]he Legislature's effort to exempt railroads is not based on a reasonable classification . . . . There is no reasonable basis for treating railroads differently from other common carriers." *Id.* at 470. The court also concluded that the appropriate remedy for this discrimination was to " 'lower[] the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state.' " *Id.* at 471 (quoting *Northern Natural Gas Co. v. State Bd. of Equalization*, 443 N.W.2d 249, 256 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990)). Pursuant to that ruling, the State Board of Equalization and Assessment ordered that petitioners' personal property taxes for 1989 should be fully refunded.[1]

In the present case, involving petitioners' 1990 property taxes, the Nebraska Supreme Court reaffirmed its prior holding that the differential statutory treatment of railroad and pipeline property violated the state uniformity clause. *MAPCO Ammonia Pipeline, Inc. v. State*

---

[1] In 1988, Nebraska had also taxed railroad personal property, but that tax was enjoined by the federal courts as a violation of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503(b)(4), because "three-fourths of the commercial and industrial personal property in the state" had been exempted from the tax. *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 418 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). As a result of the decision in *Trailer Train*, the Nebraska Supreme Court held that the taxation of pipeline company personal property in 1988 violated the Fourteenth Amendment to the United States Constitution, as well as the Nebraska Constitution. *Northern Natural Gas Co. v. State Bd. of Equalization*, 443 N.W.2d 249, 256 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990). Subsequently, in the 1989 tax year, in response to the *Northern* decision, the Nebraska legislature enacted a statutory exemption for the railroads, Neb. Rev. Stat. § 77-202(11) (Reissue 1990), which was the statute at issue in the *Natural Gas* case, discussed in text.

Bd. of Equalization, 471 N.W.2d 734 (Neb. 1991) (*MAPCO I*).[2] The court then went on to consider, *sua sponte*, the statutory exemptions that had led to the meritorious claim by the railroads in *Trailer Train* (*see* note 1, *supra*), and struck them down as well. Pet. App. 32a-37a. As the court subsequently explained, "[t]he effect of *MAPCO I* was to determine that property which had been improperly and unconstitutionally exempted should be returned to the tax rolls . . . ." Pet. App. 3a, *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization and Assessment*, 494 N.W.2d 535, 536 (1993) (*MAPCO II*). Turning finally to the remedy due petitioners, the court remanded the case to the Board, providing the following guidance: (1) that petitioners were "entitled to the same tax treatment as the railroads"; and (2) that they were not entitled to have their property value " 'equalized' at zero percent," the rate at which the railroad property had been valued. Pet. App. 32a-33a.

The State moved for rehearing, requesting clarification and instructions with respect to the "remedy which appellants are entitled to receive as a result of the opinion and order in *MAPCO* [*I*]." Brief of Appellee In Support of Motion for Rehearing at 5. The Nebraska Supreme Court denied the motion without opinion.

2. *Remedy Proceedings.* On remand, the State Board of Equalization and Assessment declined to return the unlawfully exempted property to the tax rolls for 1990, nor did it otherwise accord petitioners "the same treatment as the railroads." Instead, the Board adopted a remedy based on the amount that petitioners' taxes would have been reduced if the impermissibly exempted property had instead been taxed and had thereby contributed

---

[2] The court also rejected the legislature's attempt to support a difference in tax treatment between petitioners and the railroads by redefining petitioners' personal property as real property. The court found that the new definition was arbitrary and also legally irrelevant under the requirements of the State's uniformity clause. Pet. App. 25a-32a.

to the overall property tax base. Using this approach, the Board reduced petitioners' valuation by 18.81%, relying on testimony indicating that the railroad and other illegally exempted property had an estimated value of $13.2 billion, which was 18.81% of $70.3 billion, the assessed value of all tangible property in the state, both that which was actually taxed and that which was illegally exempted. The Board selected this methodology even though the Attorney General had advised that, "[w]hile this remedial option may well be attractive in theory, it appears inconsistent with many decisions previously rendered by our state supreme court." Attorney General's Letter of October 28, 1991, on the "Interpretation of the Nebraska Supreme Court decision in *MAPCO* [*I*]" at 14.

The Nebraska Supreme Court affirmed in *MAPCO II*. The court rejected petitioners' claim that, under this Court's decision in *McKesson*, they were constitutionally entitled to "the same treatment as those taxpayers whose property had been treated as exempt from taxation." Pet. App. 4a. The court interpreted *McKesson* as holding that "the relief to which taxpayers who have been subjected to an illegal and discriminatory tax are entitled to under the Due Process Clause of the 14th Amendment" could take any one of the following forms:

> the State might choose to erase the property deprivation by providing the taxpayer with a full refund of the tax payments, or the State could cure the invalidity by refunding the difference between the tax paid and the tax which would have been paid if all taxpayers had been treated equally. Alternatively, the [Supreme] Court held that the State might assess and collect back taxes from taxpayers who had received the unlawful benefits or it might utilize a combination of partial refunds and partial retroactive assessments of tax increases.

Ibid. With respect to this case in particular, the court concluded that the remedy adopted by the Board "con-

forms to the second method—a refund of the difference between the taxes levied against the property of the appellants and the taxes which the appellants would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed." *Ibid.*

Justice Shanahan dissented. As to the *McKesson* issue, he stated that the remedy approved by the majority bore "a marked resemblance to the Florida 'hypothetical' tax scheme condemned by the due process analysis in *McKesson Corp.*" *Id.* at 12a. Judge Shanahan also expressed the view that the decision in *MAPCO I* should only be accorded prospective application and, therefore, petitioners were not entitled to any relief, not even the 19% reduction ordered by the Board.

REASONS FOR GRANTING THE PETITION

The Nebraska Supreme Court has misread this Court's decision in *McKesson*. That case held that when a State's sole avenue for challenging a tax provision is a post-deprivation cause of action, a prevailing taxpayer has a due process right to be made whole—which, in the case of a discriminatory tax, means having its position equalized in fact with that of the impermissibly favored group. The decision below, by contrast, while slightly lessening the disparity between the two groups, nevertheless perpetuates the original unlawful discrimination. As the dissent properly recognized, that result cannot be squared with *McKesson*.

This Court should grant the petition and either summarily reverse or set the case for plenary review. The Nebraska Supreme Court's application of *McKesson* is so obviously wrong and its opinion so utterly lacking in analysis that the error is impossible to explain. Nor is the court alone in its refusal to follow this clear, binding precedent. The South Carolina Supreme Court, in a

similarly conclusory fashion, has also recently misapplied *McKesson*.

1. In *McKesson*, this Court held that when a State insists that taxpayers "pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief . . . ." 496 U.S. at 22. The Court explained that, given the government's strong interest in "financial security," the customary constitutional requirement of "*pre*deprivation process" may be dispensed with in tax collection cases. *Id.* at 37 (emphasis added). But this special timing rule is constitutionally tolerable only if the government's *post*-deprivation remedial protections are complete: "To satisfy the requirements of the Due Process Clause . . . the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *Id.* at 39 (quoting *Atchison T. & S.F. Ry. v. O'Connor*, 223 U.S. 280, 285 (1912)) (footnote omitted).

Elaborating on the appropriate nature of a post-deprivation remedy in tax cases, *McKesson* distinguished between two situations: first, when the State is found to have lacked the power to impose the tax; and second, when the State is found to have imposed a tax that is discriminatory (as in *McKesson*, where the tax favored intrastate over interstate business). In the first situation, a full refund is due the taxpayer. But in the second situation, the State has more flexibility. It may either (1) refund the taxes paid by the disfavored group, (2) retroactively impose the same tax on the favored group, or (3) use a combination of both approaches. In all events, however, the tax burdens on the two groups must be equalized: "the resultant tax *actually assessed* during

the contested tax period [must] reflect[] a scheme that does not discriminate." *Id.* at 41. (emphasis added).

Driving home this equalization requirement, the *McKesson* Court expressly rejected Florida's proposal that it "need only place [the taxpayer] in the same tax position that [it] *would have been placed* by . . . a hypothetical scheme [that would have been constitutional]." *Ibid.* In particular, Florida had argued that if it had "known [its tax] would be declared unconstitutional, [it] would have imposed the higher flat tax rate on all [taxpayers]," in which case, the complaining taxpayers would have paid exactly the same taxes. The Court held this approach to be unconstitutional because "[i]t still in fact treats petitioner[s] worse than the [favored group], thereby perpetuating the Commerce Clause violation during the contested tax period." *Id.* at 43. "[O]nly an *actual* refund (or other retroactive adjustment of the tax burdens borne by petitioner and/or its favored competitors) can bring about the *nondiscrimination* that 'prompt injunctive relief would have achieved.' " *Ibid.*

The application of *McKesson* sanctioned by the Nebraska Supreme Court plainly contradicts this core equalization requirement.[3] The discrimination in property tax burdens between petitioners and the other similarly situated taxpayers simply was not eliminated retroactively. Instead, petitioners paid the full tax and are now entitled only to a 19% refund, which the State may take up to five years (or more in certain circumstances) to pay, without interest. Neb. Rev. Stat. § 77-1736.06 (1992 Cum. Supp.). This continuing disparity impermissibly

---

[3] There is no question that Nebraska required petitioners to "pay first and obtain review of the tax's validity later in a refund action." *McKesson*, 496 U.S. at 22. Nebraska not only provides no predeprivation process in tax cases, it expressly makes willful failure to pay taxes a felony (Neb. Rev. Stat. § 77-1726 (Reissue 1990)), and also prohibits the courts from restraining the collection of taxes (*id.*, § 77-1727).

"perpetuat[es]" the discrimination that led to the property tax's invalidity in the first place. *McKesson*, 496 U.S. at 43. In fact, the approach followed below—by putting petitioners where they "would have been" if the personal property of the railroads and other exempt properties had been taxed—is substantively identical to the "hypothetical scheme" specifically rejected in *McKesson*. *See* Pet. App. 12a (dissenting opinion) ("[T]his court has approved a tax remedy which bears a marked resemblance to the Florida 'hypothetical' tax scheme condemned by the due process analysis in *McKesson*.").[4]

---

[4] In the course of arguing that *McKesson* actually *supported* the Board's remedy here, the State Board suggested that "*McKesson* is not directly applicable to the case at bar, in that it involved the remedy to be provided following a finding that a tax was unconstitutional as violative of the commerce clause, as opposed to a determination that exemptions from taxation of certain property were unconstitutional under the Nebraska Constitution." Br. of Appellee at 27. The Nebraska Supreme Court properly did not rely on the proffered distinction. While the underlying violation in *McKesson* was based on the commerce clause, the requirement of an effective remedy was, as the opinion makes clear, a due process (not a commerce clause) requirement. *See* 496 U.S. at 36 ("Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.") (footnote omitted); *see also Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 446 (1923) ("enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amendment" requires retroactive equalization of taxes). For a detailed discussion of this point, *see Smith v. Travis County Educ. Dist.*, 791 F. Supp. 1170, 1177-78 (W.D. Tex.), *vacated on other grounds*, 968 F.2d 453 (5th Cir. 1992), concluding that "[i]n *McKesson*, the Supreme Court in no way limited its holding to state taxes that are only in violation of the United States Constitution. The Due Process Clause applies to any *unlawful collection* of taxes." 791 F. Supp. at 1178 (footnote omitted).

In any event, even if a less complete remedy for a discriminatory tax that violates state, in contrast to federal, law were appropriate, that would not have any substantive effect here. While the Nebraska Supreme Court in *MAPCO I* ruled only on state grounds, its opinion

2. This Court should either summarily reverse the Nebraska Supreme Court's judgment or set the case for plenary reveiw. The court below, even as it acknowledged that *McKesson* controls the disposition of this case, plainly refused to apply the decision faithfully. The court's ruling is difficult to fathom: the opinion simply asserts, as an *ipse dixit*, that *McKesson* authorizes the remedy when, in fact, *McKesson* plainly prohibits it. Given that the dissent highlighted the error, moreover, the only plausible conclusion for this seemingly willful evasion is the dissent's further observation that "[MAPCO I] registered 10 on a Richter scale for taxquakes." Pet. App. 6a. The majority's unconstitutional attempt to dampen the aftershocks should be corrected.

The Nebraska Supreme Court is not alone in its unwillingness to follow *McKesson*. In *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810 (S.C. 1992), the South Carolina Supreme Court, in an equally cryptic and confusing opinion, likewise recently misapplied the decision. In that case, while holding that *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), required invalidation of the State's use-tax exemption for religious materials, the court refused to grant the plaintiff any relief with respect to the taxes that she had paid under the unlawful scheme,

---

makes clear that the challenged discrimination would have violated the federal equal protection clause as well, since the rationale for the ruling was that there is " 'no reasonable basis for treating railroads differently from other common carriers.' " Pet. App. 23a (quoting *Natural Gas Pipeline*, 466 N.W.2d at 470). Indeed, in an earlier case challenging taxation of pipeline property because of a federal court injunction against collection of taxes on railroad personal property, the court invalidated the pipeline property tax on federal as well as state grounds. *See Northern Natural Gas Co.*, 443 N.W.2d at 256 ("the Equal Protection Clause of the 14th Amendment mandates that the same [tax] result be reached with respect to the personal property of [a pipeline company] as that in the case of railroad and car companies"). In *Northern*, the court held that it made no difference if the railroads were favored because of federal injunction or legislative enactment. 443 N.W.2d at 256.

concluding that "*McKesson* is inapplicable." 413 S.E.2d at 815. The court's only explanation was that the plaintiff, who had paid the unconstitutionally discriminatory tax, "was not entitled to an exemption . . . . This Court cannot create an exemption by reading something into the statute which the Legislature did not intend." *Ibid.* (citation omitted). That holding, by refusing to equalize the preferred and non-preferred taxpayers' positions, is wrong under *McKesson*.

These kinds of blatant refusals to honor binding precedent should not go unchecked. In addition to its unfairness to petitioners, the decision below, if not reversed, is likely to embolden other state courts that may also be eager to avoid *McKesson*'s strong medicine.

CONCLUSION

The petition should be granted and the judgment of the Nebraska Supreme Court should be summarily reversed or the case should be set for plenary review.

Respectfully submitted.

JOEL I. KLEIN
KLEIN, FARR, SMITH
& TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

WILLIAM R. JOHNSON
(Counsel of Record)
KENNEDY, HOLLAND, DELACY
& SVOBODA
10306 Regency Parkway Drive
Omaha, NE 68114
(402) 397-0203

APPENDICES

APPENDIX A

SUPREME COURT OF NEBRASKA

Nos. S-91-1069, S-91-1070, S-91-1071, S-91-1072

MAPCO AMMONIA PIPELINE, INC.,
Appellant and Cross-Appellee,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee and Cross-Appellee,

AND GAGE COUNTY *et al.*,
Appellees and Cross-Appellants.

MID-AMERICA PIPELINE COMPANY,
Appellant and Cross-Appellee,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee and Cross-Appellee,

AND GAGE COUNTY *et al.*,
Appellees and Cross-Appellants.

TRAILBLAZER PIPELINE COMPANY,
Appellant and Cross-Appellee,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee and Cross-Appellee,

AND GAGE COUNTY *et al.*,
Appellees and Cross-Appellants.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant and Cross-Appellee,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee and Cross-Appellee,

AND GAGE COUNTY *et al.*,
Appellees and Cross-Appellants.

Filed January 22, 1993

Appeal from the State Board of Equalization and Assessment. Affirmed.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is an appeal from the order of the State Board of Equalization and Assessment (State Board) entered on the remand of *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991), and other similar cases involving appeals from the August 15, 1990, findings and order of the State Board denying the appellants' claims for property tax relief. In the prior case (*MAPCO I*), the appellants had requested that the value of their real and personal property be equalized with the value of railroad rolling stock and other similar property that had been treated as exempt from taxation.

In *MAPCO I*, we held that the process of equalization cannot be applied to property that is not taxed; that personal property and real property are both tangible property and must be equalized and taxed uniformly under Neb. Const. art. VIII, § 1, as it then existed; that the State Board erred in failing to assess or tax the rolling stock of railroad or carline companies in 1990; that

although the federal court had enjoined the collection of a particular tax because it was discriminatory, the property in question had not been exempted; that *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974) was overruled; and that the provisions of Neb. Rev. Stat. § 77-202(6) through (9) (Reissue 1990) were unconstitutional. The effect of *MAPCO I* was to determine that the property which had been improperly and unconstitutionally exempted should be returned to the tax rolls and its value equalized with all other property subject to tax.

We further held that the remedy to which the appellant were entitled was not for their property to be "equalized" at zero percent of actual value, but for it to be taxed uniformly and proportionately in compliance with art. VIII, § 1, as it then existed. The order of the State Board was reversed and the cause remanded with directions to assess the property of the appellants and equalize its value as required by article VIII, § 1, of the Nebraska Constitution and the applicable statutes.

Following the remand, the State Board met and conducted hearings on October 2 and 30, 1991, at which time the State Board received evidence and heard evidence as to how the State Board could comply with the directions of this court on the remand.

In addition to the appellants which had appeared and participated in the hearing involved in *MAPCO I*, a number of governmental subdivisions, including Gage County, cities, and various school districts, appeared and participated in the hearings and offered evidence which was objected to by the appellants on the ground that participation in the hearings on remand should be restricted to parties who had appeared and participated in the original hearings involved in *MAPCO I*. The State Board sustained the objections of the appellants and decided to not consider the evidence offered by the governmental subdivisions, which appear in this appeal as appellees and by cross-appeal contend that the State Board should have received and considered the evidence which they offered.

The political subdivisions will be directly affected by the action taken by the State Board on the remand because they had imposed and collected taxes based upon the prior action of the State Board and were faced with the possibility of being required to refund to taxpayers substantial amounts of money, depending upon the action taken by the State Board on remand of the *MAPCO I* decision.

Because the political subdivisions were interested parties, they had a right to appear before the State Board and offer evidence, and the State Board should have considered their evidence. However, since we review the record de novo and all of the evidence in question is in the record, the error is cured by our considering the evidence in this appeal.

The appellants had earlier moved to dismiss the cross-appeal. Ruling on that motion was reserved until the appeal was heard in this court. That motion is now overruled.

At the conclusion of the hearings on October 30, 1991, the State Board ordered the Tax Commissioner to reduce the equalized unit value of the appellants' property as certified by the board for tax year 1990 by 18.81 percent. It is from that order that the appellants have appealed.

The sole issue on this appeal is a determination of the relief to which the appellants are entitled as a result of the error in the August 15, 1990, findings and order of the State Board which were involved in *MAPCO I*.

The appellants contend that the value of their property should be reduced to zero for tax purposes so that they will receive the same treatment as those taxpayers whose property has been treated as exempt from taxation.

The relief which the State Board gave to the appellants was determined by calculating the ratio between the value of property considered exempt under § 77-202(6) through

(9) plus the value of railroad rolling stock and the value of all tangible property in Nebraska, including that considered to be exempt. The calculation is based largely on the testimony of Dennis Donner, an administrator of the property tax division for the Nebraska Department of Revenue. To some extent his testimony as to values was based on estimates, but it appears to be the best evidence available. The appellants had the opportunity to cross-examine Donner and offered no evidence to contradict his testimony as to values.

In *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), the U.S. Supreme Court considered the matter of the relief to which taxpayers who have been subjected to an illegal and discriminatory tax are entitled under the Due Process Clause of the 14th Amendment to the U.S. Constitution. The Court noted that the State might choose to erase the property deprivation by providing the taxpayer with a full refund of the tax payments, or the State could cure the invalidity by refunding the difference between the tax paid and the tax which would have been paid if all taxpayers had been treated equally. Alternatively, the Court held that the State might assess and collect back taxes from taxpayers who had received the unlawful benefits or it might utilize a combination of partial refunds and partial retroactive assessments of tax increases.

The remedy which the State Board selected in this case conforms to the second method—a refund of the difference between the taxes levied against the property of the appellants and the taxes which the appellants would have been required to pay—if all of the exempt property in question had been placed on the tax rolls and taxed.

We believe the relief ordered by the State Board corrects the disproportionality in the taxation of appellants' property within the class of all tangible property in compliance with article VIII, § 1, of the Nebraska Constitu-

tion and the Due Process Clause of the 14th Amendment to the U.S. Constitution. The actual disproportionality borne by the appellants is not measured by the fact that certain property escaped taxation, but by the effect of the nontaxation of certain property in relation to the class of all real and personal property. The appellants have been provided a remedy which assures that they are obligated to pay no more than their fair share of the total property tax burden, which is the amount they would have paid if the State had properly included all property on the tax rolls that should have been taxed.

The order of the State Board of Equalization and Assessment is affirmed.

AFFIRMED.

CAPORALE, J., not participating in the decision.

SHANAHAN, J., dissenting.

After *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (*MAPCO I*), registered 10 on a Richter scale for tax-quakes, today's decision, as aftershock from *MAPCO I*, again shakes Nebraska's personal property tax structure because the majority retroactively applies *MAPCO I* rather than prudently applying *MAPCO I* prospectively.

Prospective application of a judicial change in substantive law has been recognized and repeatedly approved by various courts, ranging from the U.S. Supreme Court to numerous state courts. Perhaps the foremost federal decision on prospective application of a substantive change in law is *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), wherein the Supreme Court expressed the following standard which has been accepted for more than 20 years:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may

> have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospecitve operation will further or retard its operation. . . . Finally, [the court must weigh] the inequity imposed by retroactive application, for [w]here a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

(Internal citations and quotation marks omitted.) See, also, *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990); *Gt. Northern Ry. v. Sunburst, Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

Judicial decisions that substantively change state tax laws, especially changes that lead to or necessitate tax refunds resulting from invalidation of a tax law under which taxes have been collected, are usually applied prospectively rather than retroactively, as reflected in many tax decisions by courts of other states; for example, *Carrollton-Farmers v. Edgewood Independent*, 826 S.W.2d 489 (Tex. 1992) (although the method of financing public education violated the Texas Constitution, retroactive effect of the decision declaring the tax law unconstitutional would damage the school system in a manner that could not further the purpose of the Texas Constitution; hence, the constitutional rule expressed in the decision was applied only prospectively); *Metropolitan Life v. Com'r of Dept. of Ins.*, 373 N.W.2d 399 (N.D. 1985) (refusal to order a refund of an unconstitutional premiums tax on foreign insurance companies, since the state had relied on a tax system that had existed for decades, and compulsory refunds would cause financial hardship to the state); *Foss*

v. City of Rochester, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (invalidation of a tax was prospectively applied to prevent the city from suffering an undue fiscal burden from tax refunds); *Bond v. Burrows,* 103 Wash. 2d 153, 690 P.2d 1168 (1984) (refused to require refund of unconstitutional sales tax that would result in great financial and administrative hardship to the state); *Rio Algom Corp. v. San Juan County,* 681 P.2d 184 (Utah 1984) (tax invalidation was prospectively applied so that fiscal solvency of local governments might be preserved); *Salorio v. Glaser,* 93 N.J. 447, 461 A.2d 1100 (1983) (application of judicial decision, invalidating state transportation tax deferred until 6 months after the tax decision); *Strickland v. Newton County,* 244 Ga. 54, 258 S.E.2d 132 (1979) (decision invalidating sales tax was prospectively applied to avoid unjust results); *Soo Line R. Co. v. State,* 286 N.W.2d 459 (N.D. 1979) (notwithstanding that a system for taxing centrally assessed property was unconstitutional, the judicial decision declaring unconstitutionality of the tax system was prospectively applied to prevent chaos); *Jacobs v. Lexington-Fayette Urban Cty. Government,* 560 S.W.2d 10 (Ky. 1977) (a decision, invalidating an unconstitutional personal property tax, was prospectively applied lest there be a hardship on all citizens of local government and a chaotic disruption of services); and *Southern Pacific Company v. Cochise County,* 92 Ariz. 395, 377 P.2d 770 (1963) (property tax system which systematically undervalued certain classes of property was unconstitutional, but judicial decision declaring unconstitutionality of the tax system operated only prospectively in order to prevent great hardship on government).

As reflected by many decisions of this court, a prospectively applied judicial change of substantive law is no stranger in Nebraska. See, *Myers v. Drozda,* 180 Neb. 183, 141 N.W.2d 852 (1966) (abolition of tort immunity for nonprofit charitable hospitals); *Brown v. City of Omaha,* 183 Neb. 430, 160 N.W.2d 805 (1968) (aboli-

tion of tort immunity for governmental subdivisions concerning claims based on negligence in the operation of motor vehicles); *Johnson v. Municipal University of Omaha*, 184 Neb. 512, 169 N.W.2d 286 (1969) (abolition of tort immunity for municipal universities); *Root v. School Dist. No. 25*, 184 Neb. 570, 169 N.W.2d 464 (1969) (abolition of tort immunity for local school districts); *Sosso v. Sosso*, 196 Neb. 242, 242 N.W.2d 621 (1976) (abolition of district court jurisdiction to terminate parental rights in actions for dissolution of marriage). More recently, in *Commercial Fed. Sav. & Loan v. ABA Corp.*, 230 Neb. 317, 322, 431 N.W.2d 613, 617 (1988), we overruled prior Nebraska case law that a bid at a judicial sale was revocable before acceptance, and applied prospectively a new rule, making bids at judicial sales irrevocable, because "Commercial Federal relied upon a rule in existence for 94 years. Fairness and equity dictate that the above-announced rule of law be effective as of the date of this opinion."

Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974), was this court's landmark decision which recognized and acknowledged that the Legislature was constitutionally authorized to exempt personal property from taxation pursuant to Neb. Const. art. VIII, § 2, in its previous form existing at the time of *Stahmer*: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation."

After *Stahmer*, this court decided *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), and *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987), both of which determined that certain aspects of real estate taxation were unconstitutional in view of Neb. Const. art. VIII, § 1, the uniformity clause of the Nebraska Constitution. Neither *Kearney Convention Center* nor *Banner County* involved any question concerning the Legislature's power to exempt personal property from taxation. Relying on

Kearney Convention Center and *Banner County*, the majority of this court, in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), and *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb 357, 466 N.W.2d 461 (1991), concluded that centrally assessed personal property of pipeline companies was unconstitutionally classified for tax purposes. However, even after those four post-*Stahmer* tax decisions, *Stahmer* itself endured without comment by the majority of this court. Moreover, in those four post-*Stahmer* decisions, this court, in striking down parts of Nebraska's statutory structure for taxation of personal property, wrapped itself in a crazy quilt of inconsistencies fashioned from legal whole cloth, rather than wearing a robe made of constitutional fabric.

With that background, in *MAPCO I*, this court overruled *Stahmer*, a tax decision which had stood for nearly 20 years, thereby dramatically and essentially changing the previous and longstanding view of the Legislature's tax exemption power under article VIII, § 2, and, further, declaring that the constitutionally and expressly conferred power of the Legislature for tax exemption of personal property was somehow subordinated to article VIII, § 1, the uniformity clause concerning taxation of tangible property. A strong argument exists that as the result of *MAPCO I*, the Legislature's exemptive power regarding taxation of tangible personal property was not merely judicially subordinated to another constitutional provision, but was effectively and entirely eliminated from the Nebraska Constitution. Nonetheless, *MAPCO I*, as a revolutionary ruling and a clean break with Nebraska precedent, was absolutely and totally beyond expectation and predictability by the Nebraska Legislature. The governmental hardship inflicted by *MAPCO I*, including the very real probability of myriad tax refunds, defies a definitive description. Thus, *MAPCO I* clearly meets the standard expressed in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), for prospectivity in applying a change of substantive law.

To compound the chaos, the majority has relied on *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990). In *McKesson Corp.*, the Supreme Court examined a tax scheme devised by the State of Florida to alleviate its preferential and, therefore, discriminatory tax treatment of beverages made from Florida-grown citrus crops. Florida contended that a tax refund to the disfavored distributors was unnecessary to rectify Florida's Commerce Clause violation, because if the state had known that the tax would be declared unconstitutional, a higher tax would have been imposed on all distributors. According to Florida, the disfavored distributors would have paid the same tax under this "hypothetical" tax scheme as was actually paid under the discriminatory tax system. In holding that Florida's hypothetical tax scheme violated the Due Process Clause of the U.S. Constitution, the Court stated:

> [Florida and its agencies] suggest that, in order to redress fully petitioner's unconstitutional deprivation, the State need not *actually* impose a constitutional tax scheme retroactively on all distributors during the contested tax period. Rather, they claim, the State need only place petitioner in the same tax position that petitioner *would have been placed* by such a hypothetical scheme. . . .
>
> We implicitly rejected this line of reasoning in *Montana National Bank [of Billings v. Yellowstone County*, 276 U.S. 499, 48 S. Ct. 331, 72 L. Ed. 673 (1928),] and [*Iowa-Des Moines National Bank v.*] *Bennett*, [284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931),] and we expressly do so today. . . . The deprivation worked by the Liquor Tax violated the Commerce Clause because the tax scheme's purpose and effect was to impose a relative disadvantage on a category of distributors (those dealing with non-preferred products) largely composed of out-of-state companies, not because its treatment of this category of distributors diverged from some fixed substantive

> norm. Hence, the salient feature of the position petitioner "should have occuplied" absent any Commerce Clause violation is its equivalence to the position actually occupied by petitioner's favored competitors.
>
> But the State's offer to restore [McKesson] only to the same *absolute* tax position it would have enjoyed if taxed according to a "hypothetical" nondiscriminatory scheme does not in hindsight avoid the unlawful deprivation: It still in fact treats petitioner worse than distributors using the favored local products, thereby perpetuating the Commerce Clause violation during the contested tax period.

(Emphasis in original.) 496 U.S. at 41-43.

As a result of today decision, this court has approved a tax remedy which bears a marked resemblance to the Florida "hypothetical" tax scheme condemned by the due process analysis in *McKesson Corp.* However, the due process issue which this court generates today could easily be eliminated through prospectively applying *MAPCO I.* See *American Trucking Assns., Inc. v. Smith,* 496 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990).

Because I still maintain that *MAPCO I* is incorrect in its declaration that certain personal property tax exemptions are unconstitutional, and since the majority has applied *MAPCO I* retroactively rather than prospectively, I dissent from the disposition authorized by the majority in today's decision.

APPENDIX B

STATE OF NEBRASKA
STATE BOARD OF EQUALIZATION
AND ASSESSMENT

IN RE APPEAL OF: AMOCO PIPELINE CO., *et al.*,
Appellants,

VS.

STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee.

Convened at 9:00 a.m., on October 2, 1991, and reconvened on October 30, 1991, at 9:00 a.m., in the Governor's Hearing Room, Second Floor, State Capitol Building, Lincoln, Nebraska, for purposes of hearing testimony and to affirm the judgment and opinions of the Nebraska Supreme Court in *Mapco Pipeline Company v. State Board of Equalization and Assessment* and companion cases.

BEFORE: THE STATE BOARD OF EQUALIZATION AND ASSESSMENT

Governor Nelson, Presiding

State Treasurer Rockey

Secretary of State Beermann

State Auditor Breslow

State Tax Commissioner Balka, Secretary

* * * *

MR. BALKA: I would like to restate the motion with the amended figure that came from the recalculation. That the State Board of Equalization or to the State Tax Commissioner to reduce the personal property equalized unit values of the appellants as certified by the Board for tax year 1990 by 18.81 percent.

MR. NELSON: Is there . . .

MS. ROCKEY: I'll second.

MR. NELSON: Second that. Any further discussion?

MR. WRIGHT: I guess for the record, this is Norman Wright on behalf of the taxpayers that I represent. We would object to applying an aggregate ratio to only the personal property portion of our unit value and would urge that it should be applied if at all, to the entire unit value of any particular taxpayer.

MR. NELSON: Which would include real estate?

MR. WRIGHT: Real and personal.

MR. JOHNSON: On behalf of my clients, I would also object to the use of the aggregate methodology for the reasons set forth in prior testimony and for the failure to apply it to the real property as real and personal property are all tangible property that need to be equalized or handled uniformly. I would broaden that to include all the taxpayers subject to these cases.

MR. O'BRIEN: Why don't you broaden it to include the subdivisions, also because we believe it should be applied to their unit values, not simply to their property, personal property portions only.

MR. JOHNSON: I would let Mr. O'Brien do that himself.

MR. O'BRIEN: I choose to do so. To limit it to their personal property component only, I think is unfair when they are valued as a unit value by the Tax Commissioner

on their basis. I think their protest is that their not being treated equally with other taxpayers. Our argument has been that they should be treated equally with other taxpayers. That would include any non-personal property tax component, and I believe that they would be entitled to the same reduction in that component as they would be in their personal property component.

MR. NELSON: Before you leave, am I understanding you to say that the real estate taxes should be reduced?

MR. O'BRIEN: Their protesting their tax valuation as I understand it, not simply their property tax components, but their tax valuation and I think you make a mistake if you don't consider their entire unit value as you are valuing them as a unit.

MS. ROCKEY: Mr. Bartel's is here maybe he would . . .

MR. BRESLOW: Yeah, maybe we ought to ask somebody.

MS. ROCKEY: Jay Bartel's, would you? Could we ask you a question or not?

MR. BARTEL: I'm not sure I could give you answer.

MR. NELSON: Then we'll ask . . .

MR. BALKA: Ask it anyway.

MR. NELSON: Ask it anyway.

MR. BRESLOW: Jay, I don't think there's anything wrong with us asking a question and say, I have to research it and get back to you. I mean, I think we ought to do that for the, for the record. I mean, I don't want to put you on the spot and have you say something that you may not think that, you know, have the proper research to answer it, so why don't you just come up and let us ask and you can just say, I want to think about it.

MS. ROCKEY: You can say whatever you want.

MR. BRESLOW: Yeah.

MR. BALKA: You can reserve and mix your uh . . .

MR. BEERMANN: We just want the right answer.

MR. BALKA: Absolutely.

MS. ROCKEY: Do, do we run into problems if we were to reduce the entire unit value be it both personal and real property, run into the problem of extending that same reduction to all real property?

MR. BARTEL: Well, as I believe the Attorney General indicated this morning, that obviously we haven't researched that and first, consistent with Mr. Breslow's comments, I would hesitate to give any opinion at this point as to what the effect might be as to other property outside of the taxpayers involved in these cases. If that is a concern, I suppose that's something that could be the subject of a followed up question.

MR. NELSON: Well?

MR. O'BRIEN: Let me volunteer another comment. I think you're confusing things here. You have before you tax protestors. They've appealed and gotten relief from the Supreme Court. The Supreme Court remanded these cases to you and they have directed you to assess these taxpayers and to treat them in a uniform and proportionate manner under Article VIII, Section I. You are not treating them in a uniform and proportionate manner if you cut out part of their unit value from any reduction you grant them, as a result of their protest. To the extent you do that, you're demanding that the Supreme Court reverse you again and I think that you're just, you just cannot do that. You have to, if you're going to give them a reduction as, as the motion has been made, give them the reduction. You can't parcel it out a little here and not so much over there. It has nothing to do with other real property. It has nothing to do with other taxpayers for that tax year. Their not here, their not in front

of you, and there's no effect on them by what action you take. You're dealing only with the discrete set of facts, a discrete number of parties, and a particular value as to each individual taxpayer. You have to treat them in that way.

MR. NELSON: Okay.

MR. BALKA: Am I understanding, you Jay, that you have no opinion one way or other that question?

MR. BARTEL: That's correct.

MR. BALKA: Okay.

MR. NELSON: Being opinionless . . .

MR. BALKA: I think we ought to revise it?

MR. NELSON: Are we prepared to . . .

MR. BALKA: Revise.

MR. NELSON: Revise the motion?

MR. BALKA: To strike the reference to personal property. The motion to be voted on at this point, would be the State Board of Equalization or to the State Tax Commissioner to reduce the equalized unit value as certified by the Board, State Board of Equalization for tax year 1990 by the appellants by 18.81 percent.

MS. ROCKEY: I'll second again.

MR. NELSON: Okay, any further discussion?

MR. BRESLOW: I would just like to say that I, and I kind of said this earlier. I'm not real happy with any of our options that we have today, and I don't think any of us are. Probably what bothers me about this whole morning and afternoon is that, no matter what we do, there really aren't any real solutions and, and I'm going to vote yes for this motion, but vote reluctantly and, and I wish there was, you know, some other way to do it and I'm sure we all feel that way.

MR. BALKA: Ready for a roll call vote?

MR NELSON: Ready for roll call.

MR. BALKA: Governor Nelson?

MR. NELSON: Voting aye.

MR. BALKA: Secretary of State Beermann?

MR. BEERMANN: Voting aye.

MR. BALKA: Auditor Breslow?

MR. BRESLOW: Yes.

MR. BALKA: Treasurer Rockey?

MS. ROCKEY: Voting aye.

MR. BALKA: Let the record show the Tax Commissioner votes aye.

MR. NELSON: Motion carries. Okay, at this point, it's . . . There being no other matters to become before this Board . . . There's one further, one further matter. One further matter, please.

MR. BEERMANN: I would authorize that pursuant to our actions that Tax Commissioner and the staff do all things necessary to report back to the Supreme Court on the remand.

MS. LANG-MORRISSEY: I'm sorry. Say that again, do we . . .

MR. NELSON: What he wants to do is . . .

MR. BEERMANN: Notify.

MR. NELSON: Report this action back to the Supreme Court.

MS. LANG-MORRISSEY: Okay.

MR. BEERMANN: And uh . . .

MR. NELSON: And authorize . . .

MR. BALKA: That, that the Tax Commissioner and staff be authorized to report back all the things necessary.

MS. LANG-MORRISSEY: Okay. Yes, sir.

MR. BEERMANN: You want to second that one.

MR. BRESLOW: Yeah, sure, second.

MR. NELSON: A roll call vote. "Aye".

MR. BALKA: Aye.

MS. ROCKEY: Aye.

MR. BEERMANN: Aye.

MR. BRESLOW: Aye.

MR. NELSON: Okay. All those in favor of adjourning say "aye".

MR. BALKA: Aye.

MS. ROCKEY: Aye.

MR. BEERMANN: Aye.

MR. BRESLOW: Aye.

MR. NELSON: So adjourned.

APPENDIX C

SUPREME COURT OF NEBRASKA

Nos. 90-871, 90-872, 90-873, 90-874

MAPCO AMMONIA PIPELINE, INC.,
Appellant,
v.
STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee.

MID-AMERICA PIPELINE COMPANY,
Appellant,
v.
STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee.

TRAILBLAZER PIPELINE COMPANY,
Appellant,
v.
STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,
v.
STATE BOARD OF EQUALIZATION AND ASSESSMENT,
Appellee.

July 10, 1991

HASTINGS, C.J., and BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM:

These are appeals from the findings and order of the State Board of Equalization and Assessment (State Board) dated August 15, 1990, denying claims for property tax relief submitted by various centrally assessed and locally assessed claimants. Pursuant to our order of September 17, 1990, the parties filed a "case stated" in accordance with Neb.Ct.R. of Prac. 5 L (rev. 1989), separately setting forth the rulings of the State Board complained of by the appellants and the exceptions and contentions of the parties with respect to those issues.

The appellants are public service entities within the meaning of Neb.Rev.Stat. § 77-801.01 (Reissue 1990) and are centrally assessed for purposes of personal property taxation. Due to an identity of issues and counsel, we have consolidated the appeals of MAPCO Ammonia Pipeline, Inc. (case No. 90-871), Mid-America Pipeline Company (case No. 90-872), Trailblazer Pipeline Company (case No. 90-873), and Natural Gas Pipeline Company of America (case No. 90-874) for disposition.

Following our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* —— U.S. ——, 110 S.Ct. 1130, 107 L.Ed.2d 1036 (1990), but prior to our decision in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), the appellants appeared before the State Board requesting equalization of their real and personal property (1) with railroad rolling stock, which had been exempted from taxation by the passage of L.B. 7 on November 17, 1989 (codified at Neb.Rev.Stat. §77-202(11) (Reissue 1990)), and (2) with center pivot and other irrigation systems used for agricultural purposes and equipment and machinery used for business purposes that had been excluded from the definition of real property by L.B. 1, also passed November 17, 1989 (now codified at Neb.Rev.Stat. § 77-103 (Reissue 1990)).

I

The record shows that the State Board convened on August 8, 1990, for the purpose of determining the value of the appellants' property for 1990 and to equalize such valuations for tax purposes within the state. The evidence presented at the August 8 hearing consisted of essentially the same record as that considered by the State Board in 1988 and 1989. Dennis Donner, a manager in the property tax division of the Nebraska Department of Revenue, testified he was of the opinion that 75 percent of commercial and industrial personal property remained exempt from taxation in Nebraska in tax year 1990. In light of the passage of L.B. 7 on November 17, 1989, which exempted railroad rolling stock from taxation, the State Tax Commissioner did not value, assess, or tax any rolling stock of railroad or carline companies operating in Nebraska. The State Board also considered issues related to L.B. 1, which changed the statutory definition of "fixture." The appellants contended that L.B. 7 and L.B. 1 were unconstitutional.

During the August 8 hearing, the State Board declined to grant the relief sought by the appellants and set the statewide equalization rate at 92.13 percent of actual value. The State Tax Commissioner subsequently adjusted the total taxable value of the appellants' property and certified those values to the various counties using the 92.13-percent figure as determined by the State Board.

In its findings and order of August 15, 1990, the State Board described the appellants' requests as "purported claims for 'equalization' . . . which are, in fact, based on a request of the State Board to declare unconstitutional [certain] acts of the Nebraska Legislature. . . ." The State Board then found that it did not have jurisdiction to consider claims for equalization of property within a class of taxable property to property which is separately classified and exempted from taxation, and that the con-

stitutionality of legislative acts granting exemptions from property taxation may not be raised before and decided by the State Board.

Although the State Board found it did not have subject matter jurisdiction to hear and decide various claims made based on the alleged unconstitutionality of certain legislative acts, several issues of this nature were presented to the State Board. These issues included the constitutionality of L.B. 7, pertaining to the classification of railroad rolling stock as tax exempt, and L.B. 1, which amended the statutory definition of "fixture."

We held in *Natural Gas Pipeline Co., supra* at 371, 466 N.W.2d at 470, that the portion of L.B. 7 exempting railroad rolling stock from taxation was unconstitutional because the Legislature had

> no reasonable basis for treating railroads differently from other common carriers; therefore, the distinction, as a classification and basis for an exemption from personal property tax, reflected in L.B. 7, result[ed] from special legislation, prohibited by Neb. Const. art. III, § 18, and violat[ed] the uniformity clause of Neb. Const. art. VIII, § 1.

With respect to L.B. 1, the State Board found that

> the Legislature has broad powers to define the nature of property for tax purposes, so long as the definitions established are reasonable. . . . [T]he Board further finds that the evidence presented shows that the valuation of irrigated agricultural land (real property), is subject to taxation, and reflects the value of the annexed portion of the irrigation system; and that the sprinkler arm and power unit used in center pivot irrigation (or the piping and power unit used in gravity irrigation) are *not* annexed to land (real property) and are thus easily and readily removable without injury to the real property.

> Therefore, these particular items constitute personal property which is reasonably excepted from the definition of real property under LB 1. This personal property is classified separately and exempted from taxation pursuant to Section 77-202(6) [(Reissue 1990)], as agricultural income-producing machinery and equipment, a classification of exempt personal property upheld as constitutional in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974). Accordingly, the State Board finds claimants [sic] contentions that LB 1 unconstitutionally exempts certain "real" property (*i.e.*, center pivot irrigation equipment) to be both contrary to the evidence and erroneous as a matter of law.

In their assignments of error, the appellants contend the State Board erred (1) in holding that it had no statutory or constitutional authority or jurisdiction to rule on the appellants' requests for relief, (2) in holding that L.B. 7 was constitutional, (3) in applying L.B. 1 and finding L.B. 1 constitutional, and (4) in failing to grant the appellants' requests for relief based on the absence of uniformity and proportionality of taxation, in violation of Neb. Const. art. VIII, § 1. The appellants further contend the taxation of their property at 92.13 percent of actual value is in violation of the equal protection clause of U.S. Const. amend. XIV.

As the State Board now concedes, it did have jurisdiction to consider the appellants' requests for relief in these cases. In *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 815, 443 N.W.2d 249, 255 (1989), we held that "in an application before the [State] Board, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal."

The State Board also agrees that its finding that the portion of L.B. 7 exempting railroad rolling stock from

taxation was constitutional was in error in view of our holding in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), that the portion of L.B. 7 exempting railroad rolling stock from taxation was unconstitutional.

The remaining issues in these appeals, therefore, involve (1) the constitutionality of L.B. 1 and (2) the validity of the appellants' arguments that the taxation of their personal property under Nebraska law violates Neb. Const. art. VIII, § 1, and the equal protection clause of U.S. Const. amend. XIV.

II

Section 77-103, as amended by L.B. 1, provides:

> The terms real property, real estate, and lands shall *mean* city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto, *and pipelines, railroad track structures, electrical and telecommunication poles, towers, lines, and all items actually annexed to such property, and any interest pertaining to the real property or real estate.*
>
> *The sole test for determining whether an item is a fixture or an improvement shall be whether there is actual annexation to the real property or real estate or something appurtenant thereto. Unless specifically enumerated in this section, real property and real estate shall not include machinery and equipment used for business purposes or center pivot or*

other irrigation systems of a type used for agricultural or horticultural purposes.

(Amendatory language emphasized.)

The appellants contend L.B. 1 is unconstitutional (1) as an abuse of the Legislature's power to define, in that it tends to nullify certain provisions of Neb. Const. art. VIII, §§ 1 and 2, and (2) as it creates an arbitrary classification, in violation of Neb. Const. art. III, § 18. In every constitutional challenge, it is presumed that all acts of the Legislature are constitutional, and all reasonable doubts are resolved in favor of constitutionality. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989). Bearing this standard in mind, we conclude that L.B. 1 is unconstitutional in its entirety.

As we noted in *Natural Gas Pipeline Co., supra*, L.B. 1 changed the statutory definition of "fixture," apparently to avoid the characterization of certain pipeline property as personal property rather than real estate, thus increasing the proportion of pipeline property presumably taxable as real estate under *Northern Natural Gas Co. v. State Bd. of Equal., supra.* (We note that in *Northern Natural Gas Co.*, the taxpayers did not ask for any relief regarding real estate.)

Although the Legislature has broad power to define property for tax purposes, its power to define is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded. See, *State ex rel. Meyer v. Peters,* 191 Neb. 330, 215 N.W.2d 520 (1974); *Moeller McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934).

The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution. In *State ex rel. Meyer v. Peters,*

supra, we considered legislation purporting to exempt "household goods" from taxation pursuant to Neb. Const. art. VIII, § 2, which provided: "Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part. . . ." The definition of "household goods" in the taxing statute at issue in *Peters*, however, included "major appliances either attached or detached to real property." See § 77-202(1)(d) (Reissue 1971). In other words, the statute purported to exempt property which would, under the common law of fixtures, be considered real estate. In holding that the Legislature could not constitutionally exempt such fixtures from taxation, we recognized the difficulty inherent in granting the Legislature unbridled definitional powers:

> Any definitional powers given to the Legislature are prefixed and limited. The power to define household goods and personal effects necessarily is limited to those articles which ordinarily would be understood to be embraced within that term. Certainly, it cannot be interpreted to give the Legislature power to include air-conditioning systems, furnaces, automobiles, or real estate within the term "household goods and personal effects." Since there must be a limit to such powers, it is reasonable to find the common law concepts serve as guides.

State ex rel. Meyer v. Peters, supra, 191 Neb. at 334, 215 N.W.2d at 524.

Similarly, in *Moeller, McPherrin & Judd v. Smith, supra*, the Legislature attempted to tax various items of intangible personal property as tangible personal property merely by defining them as such. This court struck down the attempted redefinition, observing:

> Section 77-104, Comp.St.1929, which House Roll No. 9 purports to amend, provided that tangible property included all personal property possessing a physical existence, but excluding money, and then

> defined intangible property as all other personal property, including money. Section 2 of House Roll No. 9 attempts to amend this by providing that tangible property shall consist of two classes, and that class 1 shall be all personal property possessing a physical existence, and then provides that class 2 of tangible property shall include stocks, notes, securities of foreign countries, accounts, judgments, liens of any kind, bonds, and all demands for labor, or other valuable thing, due or to become due. This introduces a new query, which is: May a legislature, under the guise of defining a word, do so with a definition which contravenes our Constitution, and which is not true or legal in fact? . . .
>
> Can the legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the legislature has power to define words used by it, but is this an unlimited power, or is it subject to a reasonable construction? . . . In our opinion, there is a limit to the legislature's power to nullify and circumvent constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word.

Moeller, McPherrin & Judd v. Smith, supra, 127 Neb. at 432-33, 255 N.W. at 555-56.

The definition found in § 77-103, as amended, tends to nullify or circumvent a provision of the Nebraska Constitution, in that Neb. Const. art. VIII, § 2, provides, "The Legislature may classify *personal property* in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." (Emphasis supplied.) In this case, the Legislature has not so much "classified" certain items of personal property as it has arbitrarily declared the personal property owned by an unfavored group of taxpayers to be "fixtures," so that it is presumably taxable as real estate under our decision in *Northern Natural Gas Co. v. State*

Bd. of Equal., 232 Neb. 806, 443 N.W.2d 249 (1989). Here, the Legislature has attempted to define and designate as a "fixture" that which is, in fact and in truth, personal property and has gone beyond the bounds of its legitimate powers under our Constitution in doing so.

In any event, personal property and real property are both "tangible property" under Nebraska law and must be equalized and taxed uniformly pursuant to Neb. Const. art. VIII, § 1. *See, Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991); *Banner County v. State Board of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987); *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966).

Neb. Const. art. III, § 18, provides that "where a general law can be made applicable, no special law shall be enacted." A legislative act can violate Neb. Const. art. III, § 18, as special legislation (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). The classification set forth in § 77-103, as amended, also is unconstitutional under article III, § 18, because it is not based on a real and substantial difference between "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" and similar machinery and equipment used for other purposes.

In *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 608-09, 300 N.W.2d 181, 187 (1980), we held:

> While it is true that the Legislature may classify where reasonable . . . it may not do so in an arbitrary manner. In *City of Scottsbluff v. Tiemann*, [185 Neb. 256, 266, 175 N.W.2d 74, 81 (1970)], we specifically said: "It is competent for the Legis-

> lature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. [Citation omitted.] The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. [Citations omitted.] The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. [Citation omitted.] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.* [Citations omitted.]" (Emphasis in original.)

See, also, *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

In § 77-103, as amended by L.B. 1, the classification of agricultural and business machinery is based solely on use. In *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 177 N.W.2d 596 (1970), this court was presented with the question of whether agricultural income-producing machinery and equipment used by any business which was required by law to report taxable income pursuant to the Internal Revenue Code constituted a reasonable classification for purposes of taxation. In that case, the Legislature attempted to separately classify for taxation purposes certain agricultural income-producing machinery and equipment. This method would have provided a

different value for personal property specified in the act from that applied to all other tangible property in the same class.

In *McNeil, supra*, we observed that the establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity, contrary to Neb. Const. art. VIII, § 1. We held:

> We necessarily find that the purported classification of property for tax purposes contained in the act does not rest on reasons of public policy, or any substantial difference of situation or circumstance that naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. It is therefore an attempt to create a classification within a classification without any reasonable grounds for so doing other than to secure advantages for those falling within the purview of the act. It is violative of the uniformity provisions of Article VIII, section 1, of the Constitution. It is in effect special legislation in violation of Article III, section 18, of the Constitution.

McNeil, supra at 589-90, 177 N.W.2d at 599.

In the present case, "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" are tangible property which must be taxed uniformly both as to valuation and rate of tax. As we observed in *McNeil, supra* at 588-89, 177 N.W.2d at 598:

> There can be no difference in the method of determining valuation or the rate of tax to be imposed unless the separate classification rests on some reason of public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

When the Legislature attempted to remove pipelines from the category of personal property after our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), it apparently realized that its new test to determine what is real property would include center pivot or other irrigation systems used for agriculture or horticulture. The Legislature excluded irrigation systems used for these purposes from the definition of "real property," leaving them exempt "personal property" under § 77-202(6) (Reissue 1990) as "[a]gricultural income-producing machinery and equipment." The classification is not based on a real and substantial difference between "machinery and equipment used for business purposes or center pivot or other irigation systems of a type used for agricultural or horticultural purposes" and the same machinery and equipment used for other purposes. The legislation is, therefore, violative of Neb. Const. art. III, § 18.

III

Since both L.B. 1 and L.B. 7 are unconstitutional, we make four observations: (1) The ratio of "real" to "personal" pipeline property remains essentially unchanged since our decision in *Northern Natural Gas Co. v. State Bd. of Equal., supra;* (2) personal property and real property are both "tangible property" under Nebraska law and must be equalized and taxed uniformly pursuant to Neb. Const. art. VIII, § 1; (3) the State Board erred in failing to assess or tax the rolling stock of railroad or carline companies operating in Nebraska in 1990; and (4) the appellants are entitled to the same tax treatment as the railroads, carline companies, and other centrally assessed taxpayers pursuant to Neb. Const. art. VIII, § 1, and our decisions in *Northern Natural Gas Co., supra,* and *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991).

To what relief are these taxpayers entitled? The appellants contend they should be "equalized" at zero per-

cent for 1990 because the Tax Commissioner did not value, assess, or tax any rolling stock of railroad or car-line companies operating in Nebraska in 1990. We conclude that this proposed remedy is inappropriate.

Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. See, *Yellowstone Pipe Line Co. v. State Bd. Equal.*, 138 Mont. 603, 358 P.2d 55 (1960), *cert. denied*, 366 U.S. 917, 81 S.Ct. 1095, 6 L.Ed.2d 241 (1961). As we said in *Natural Gas Pipeline Co., supra*, 237 Neb. at 366, 466 N.W.2d at 467, "The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax." Accord, *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987); *Hacker v. Howe*, 72 Neb. 385, 101 N.W. 255 (1904). The process of equalization, therefore, cannot be applied to property that is not taxed. The appellants' remedy in this case, although based on the uniformity and proportionality requirement of Neb. Const. art, VIII, § 1, does not involve "equalization." Any language in our opinion in *Northern Natural Gas Co., supra*, which might be read as implying the contrary is hereby disapproved.

IV

The issues raised in these appeals have evolved from the decision of the U.S. Court of Appeals for the Eighth Circuit in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir.1988), which construed § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. 94-210, 90 Stat. 31, 54, codified as amended at 49 U.S.C. § 11503(b)(4) (1988) (the 4-R Act). Section 306(1)(d) prohibits the states from imposing a tax on transportation property when the tax "results in discriminatory treatment of a common car-

rier by railroad . . . ." The federal court considered personal property tax exemptions in determining whether there was discriminatory tax treatment of railroads in the Nebraska tax structure, and ultimately concluded that when tax exemptions applied to three-fourths of the commercial and industrial property in Nebraska, and did not apply to railcars, the tax system in Nebraska discriminated against Trailer Train in violation of § 306(1)(d) of the 4-R Act. For that reason, in *Trailer Train Co.*, the State of Nebraska was enjoined from "collection of the discriminating tax," 885 F.2d at 418, but was not prohibited from levying a lawful nondiscriminatory tax on a common carrier by railroad. The record shows that the same illegally discriminatory tax system that was at issue in *Trailer Train Co., supra, Northern Natural Gas Co., supra,* and *Natural Gas Pipeline Co., supra,* existed during the 1990 tax year.

U.S. Const. art. VI, cl. 2, the supremacy clause, provides that the U.S. Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The supremacy clause of the U.S. Constitution binds the several states, subordinates state law; whether constitutional, statutory, or judicially enunciated, to a congressional enactment; and supersedes state law which conflicts with federal law. *Chapman v. Union Pacific Railroad,* 237 Neb. 617, 467 N.W.2d 388 (1991); *State ex rel. Douglas v. Karnes,* 216 Neb. 750, 346 N.W.2d 231 (1984). Cf., *Northern Natural Gas Co. v. State Bd. of Equal.,* 232 Neb. 806, 443 N.W.2d 249 (1989); *State Bank v. Endres,* 109 Neb. 753, 192 N.W. 322 (1923). In other words, federal law controls over state law, including state constitutional law.

Applying this fundamental principle in *Northern Natural Gas Co. v. State Bd. of Equal., supra,* we concluded

that disproportionality in taxation within a class of property required this court to

> correct [a] constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. [Citations omitted.] This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court [*Trailer Train Co., supra*] exempting the personal property of the railroads and car companies from the imposition of a state tax.

232 Neb. at 815, 443 N.W.2d at 256. At this point, we note that in characterizing the federal court's action as "exempting" the property in question, we recognized only that the federal court had enjoined the collection of the particular tax that had been levied that year. Although a court may have the power to enjoin the collection of a tax, as was done in *Trailer Train Co.*, courts do not have jurisdiction to grant tax exemptions. In *Northern Natural Gas Co., supra*, we did not "exempt" the appellants' personal property from taxation, but remanded the matter to the State Board, noting that the appellants' unitary value, including both real and personal property, might need to be adjusted so as to achieve uniformity and proportionality of taxation in compliance with Neb. Const. art. VIII, § 1.

The situation presented to us in *Northern Natural Gas Co., supra*, was similar to that in *State Bank v. Endres, supra*, where the plaintiff, State Bank of Omaha, sought to enjoin the collection of taxes assessed against it under the provisions of Comp.St. § 5887 (1922).

In 1921, the Legislature classified property subject to taxation into two groups—tangible and intangible. Tangible property was required to be listed at its true value

and assessed upon the mill rate levy. Intangible property, with certain exceptions, was required to be listed at its true value, and a tax was levied thereon at 25 percent of the mill rate levied upon tangible property. Regarding shares of stock in banking corporations, § 5887 required the officers of banks, loan and trust companies, or investment companies to deliver to the county assessor a sworn statement showing the number of shares of stock held by each person, the names and residences of the stockholders, and the value of the stock. It was the duty of the assessor to assess the capital stock at the same rate as tangible property was assessed in the taxing district where the principal place of business of the bank was located. As the *Endres* court noted, the Legislature plainly intended to classify certain intangible property (bank stock) and place it for taxation purposes upon the same basis as tangible property, and the shares of stock in national banks were placed on the same basis as shares of stock in state banks.

At the time *Endres* was decided, federal law provided that state taxation of shares in the national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State . . . ." U.S.Rev.Stat. § 5219 (2d ed. 1878). In *Merchants' Natl. Bank v. Richmond*, 256 U.S. 635, 41 S.Ct. 619, 65 L.Ed. 1135 (1921), the Court held that "moneyed capital in the hands of individual citizens" included bonds, notes, and other evidences of indebtedness in the hands of individuals, which were shown to come materially into competition with the national banks in the loan market.

Under § 5887, therefore, the stock of state and national banks located in Nebraska was being taxed on the same basis as tangible property, while "other moneyed capital in the hands of individual citizens" was subject to the lower tax on intangible property. Accordingly, the *Endres* court found that "the method adopted by our legislature

of taxing shares of stock in banks, in so far as it applies to shares of national banks, is beyond the power of the legislature," as a violation of federal law. *State Bank v. Endres,* 109 Neb. 753, 757, 192 N.W. 322, 324 (1923).

Having concluded that the national banks could not lawfully be taxed on the same basis as tangible property, the court held that under Neb. Const. art. VIII, § 1, state banks could not be taxed on the same basis as tangible property:

> While the legislature has the undoubted right to make a reasonable classification of intangible property for the purposes of taxation, it would seem clear that a classification, the effect of which would be to tax its shares of stock four times as much as the shares of a national bank, would be an unreasonable exercise of its power, and would be in violation of section 1, art. VIII of the Constitution, which, while giving the legislature power to classify intangible property, nevertheless requires that taxes shall be uniform as to class.
>
> . . . [S]ection 5887, Comp.St.1922, relating to the duty of the assessor in taxing shares of stock in banks, banking associations and trust companies, in so far only as it declares "such capital stock shall thereupon be listed and assessed by him at the same rate as tangible property . . ." is invalid as to national banks, because it conflicts with the act of congress forbidding states to tax shares of a national bank at a greater rate than is assessed upon other moneyed capital, and, with national banks excluded from its operation, it is also invalid as to state banks, because the latter would then be taxed at a higher rate than national banks, and therefore the taxation would conflict with that part of the state Constitution requiring taxes to be uniform as to class.

Endres, supra at 757-58, 192 N.W. at 324.

V

In the present case, the federal courts have determined that tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d) of the R-4 Act. See *Trailer Train Co. v. Leuenberger,* 885 F.2d 415 (8th Cir.1988). As discussed above, Nebraska's system of ad valorem taxation discriminates against railroads and carline companies, in violation of federal law, because "[w]hen the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against [owners of rolling stock] and violates § 306(1)(d) of the 4-R Act." 885 F.2d at 418. The record before us shows that 75 percent of commercial and industrial personal property remains statutorily exempt from taxation.

As the State Board observes in its brief, the nontaxation of railroad rolling stock, which has given rise to the plethora of equalization claims presented before the State Board and this court in recent years, has resulted from the enforcement of the antidiscrimination provisions of § 306(1)(d) of the 4-R Act. The impermissible discrimination forming the basis for the federal court decisions interpreting and applying the 4-R Act, in turn, resulted solely from tax exemptions provided under Nebraska law to various types of property not owned by railroads or carline companies.

The State Board correctly notes that the exemptions challenged by the appellants as discriminatory under § 306(1)(d) of the 4-R Act, consisting of agricultural income-producing machinery and equipment, agricultural products, and business inventories exempted under § 77-202(6) through (9), were upheld as legitimate classifications of personal property in *Stahmer v. State,* 192 Neb. 63, 218 N.W.2d 893 (1974). In *Stahmer,* this court justified the partial exemption from taxation of an entire

class of personal property, agricultural machinery, holding that the power to exempt personal property from taxation granted by the 1970 amendment to Neb. Const. art. VIII, § 2, to wit: " 'The Legislature *may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation*' " (emphasis in original), 192 Neb. at 67, 218 N.W.2d at 896, prevails over the uniformity requirement of Neb. Const. art. VIII, § 1, and is subject only, if at all, to the reasonableness of the classification of exempt property. Significantly, no issues of federal law were raised by the parties or considered by this court in *Stahmer v. State.*

The enforcement of § 306(1)(d) by the federal court's enjoining the collection of taxes, and similar relief granted by this court pursuant to Neb. Const. art. VIII, § 1, has had the effect of making Nebraska's system of taxation increasingly discriminatory as to the remaining taxpayers. A comparable situation was presented in *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985), where we reconsidered *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966), in which this court upheld the constitutionality of a statute exempting hotels with more than 25 sleeping rooms from the statutory restriction that no person could have a beneficial interest in more than two liquor licenses. In *Safeway Stores, Inc.*, we reasoned that the classification tended to promote stability in the liquor trade and temperance by curbing a threatened monopoly by chain stores. However, by the time this court heard *Casey's Gen. Stores, supra*, the Legislature had expanded the exemptions to include certain restaurants, some cites, and selected bowling alleys. In *Casey's Gen. Stores*, we concluded that the expanded exemptions rendered the reasoning in *Safeway Stores, Inc.*, obsolete, as it could no longer be said that the exemptions protected Nebraska operations. Therefore, in *Casey's Gen. Stores*, we concluded that the liquor licenses pro-

hibitions violated the equal protection clause of U.S. Const. amend. XIV.

In the present case, Nebraska's failure to correct illegal discrimination in its tax structure has caused an increasing concentration of the tax burden on a shrinking group of taxpayers. We conclude that our reasoning in *Stahmer v. State, supra,* is now obsolete in light of subsequent developments in federal law, particularly the enactment of § 306 of the 4-R Act, effective in 1979, and numerous court decisions interpreting that legislation. As Judges White and Fahrnbruch observed in their concurring opinion in *Natural Gas Pipeline Co. v. State Bd. of Equal.,* 237 Neb. 357, 466 N.W.2d 461 (1991), even if Nebraska's present classification of property as exempt and not exempt was to be found valid under the Nebraska Constitution, the system could not withstand muster under federal law. Federal law has eviscerated the portion of Neb. Const. art. VIII, § 2, that was at issue in *Stahmer v. State.* Accordingly, *Stahmer v. State* is overruled.

VI

It is obvious that in order to reach any meaningful resolution of the problem presented to us, this court must address the legality of the exemption of three-fourths of the commercial and industrial property in Nebraska. See § 77-202(6) through (9). We determine that the appellants' remedy in this case is not for their property to be "equalized" at zero percent of actual value, but for it to be taxed uniformly and proportionately in compliance with Neb. Const. art. VIII, § 1. In their apparent zeal to avoid taxation entirely, however, the appellants have not specifically questioned the constitutionality of the tax exemptions found in § 77-202.

In *State v. Goodseal,* 186 Neb. 359, 368, 183 N.W.2d 258, 263-64 (1971), *cert. denied* 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 82, this court held that although the parties ordinarily must raise constitutional issues before

they will be considered on appeal, "where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried." The same is true in this case.

Pursuant to § 77-202(1), household goods and certain property owned by nonprofit religious, educational, charitable, horticultural, or cemetery organizations is exempt from taxation. The validity of these exemptions has not been challenged in this court and, to our knowledge, has not been challenged in federal court. Section 77-202 further provides:

> (6) Agricultural income-producing machinery and equipment shall be exempt from the personal property tax except: (a) Motor vehicles, as defined in section 60-301; (b) property assessed by the Tax Commissioner as provided in sections 77-601 to 77-623 [railroad property]; (c) property owned by parties deemed public service entities subject to the provisions of sections 77-801 to 77-803; and (d) any building or fixture, whether permanently attached to the land or not.
>
> (7) Business inventory shall be exempt from the personal property tax.
>
> (8) Feed, fertilizer, and farm inventory shall be exempt from the personal property tax.
>
> (9) Grain, seed, livestock, poultry, fish, honeybees, and fur-bearing animals shall be exempt from the personal property tax.

In *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), the U.S. Court of Appeals condemned as discriminatory Nebraska's constitutional and statutory scheme of taxing only 25 percent of personal property while exempting the remaining 75 percent and enjoined the State of Nebraska from collecting the discriminatory tax on railroad rolling stock. In *Northern Natural Gas*

Co. v. State Bd. of Equal., 232 Neb. 806, 815, 443 N.W.2d 249, 256 (1989), this court held that "if the [State] Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action," the complaining taxpayer was entitled to relief pursuant to Neb. Const. art. VIII, § 1. We also determined in *Northern Natural Gas Co., supra* at 815, 443 N.W.2d at 256, that the state, "by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution."

As in *State Bank v. Endres*, 109 Neb. 753, 192 N.W. 322 (1923), federal law has now rendered Nebraska state law invalid under the Nebraska Constitution. We hold that the property tax exemptions enumerated in § 77-202(6) through (9) are unconstitutional under Neb. Const. art. VIII, § 1, in that they prevent the levy of taxes "by valuation uniformly and proportionately upon all tangible property and franchises."

VII

In light of the foregoing, the order of the State Board of Equalization and Assessment is reversed and the cause remanded with directions to assess the property of the appellants and equalize its value as required by article VIII, § 1, of the Nebraska Constitution and the applicable statutes.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FAHRNBRUCH, Justice, concurring.

I concur fully with the majority opinion. Although to reach its conclusion it was unnecessary for the majority to expressly rely upon the equal protection clause of the

14th amendment to the U.S. Constitution, that clause, nevertheless, might well be a viable consideration in future tax cases, as it has been in the determination of various tax cases since 1923. See, *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989); *State ex rel. Douglas v. State Board of Equalization and Assm't*, 205 Neb. 130, 286 N.W.2d 729 (1979) (the equal protection clause of the 14th amendment is applicable to state tax legislation and imposes restraint upon state taxing power); *Knoefler Honey Farms v. County of Sherman*, 196 Neb. 435, 243 N.W.2d 760 (1976).

SHANAHAN, Justice, concurring in part, and in part dissenting.

Since the State Board of Equalization and Assessment has failed to carry out its duty to equalize taxable property, a non-performance the same as noted and disapproved in *Natural Gas Pipeline v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991) (Shanahan, J., concurring), the equalization board's order must be vacated and these causes must be remanded for further proceedings. However, the grounds used by this court's majority today, striking down certain tax legislation, lack foundation in the Nebraska Constitution.

As a result of *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), Nebraska had only a judicial or common-law definition for "fixture" in reference to taxation of property, a definition which directed that three elements or factors determined whether an article was a fixture and, therefore, real estate, or whether the article was personal property. Under the judicial definition expressed in *Northern*, the three elements or factors were (1) annexation or attachment to real estate whereby an article was actually added to the real estate to form a unit comprised of land and

the article fastened to the land, (2) appropriation to the use or purpose of the land to which the article was connected, and (3) whether the one who connected the article to the land intended that the article be part of the land after the article's annexation.

In view of *Northern* and to avoid the foregoing three-part judicially formulated test, the Nebraska Legislature, in L.B. 1, Neb.Rev.Stat. § 77-103 (Reissue 1990), eliminated appropriation to use and a connector's intention as determinative factors for a fixture and directed that "actual annexation" was the only determinant for a fixture. In that manner, the Legislature statutorily replaced and narrowed the previous common-law definition of a "fixture" expressed in *Northern*.

Can the Legislature define types of property for tax purposes? The Legislature's power to define is subject to two constitutional limitations: (1) The Legislature cannot abrogate or contradict a definitional provision in the Constitution and (2) the legislative definition cannot be arbitrary or without foundation in reality. See, *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974); *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934).

The Nebraska Constitution contains no provision specifying a definition for "real estate" or prohibiting the Legislature from defining "real estate." Thus, subject to limitations imposed by a constitution and reality, a legislature can statutorily change the usually accepted common-law definition of real estate and can designate subjects to be assessed and taxed as real estate. See, *Roberts v. Assessment Bd. of Rev. of New Windsor*, 84 Misc.2d 1017, 375 N.Y.S.2d 988 (1975) (a legislature has the power to determine that certain types of property, ordinarily characterized as personal property, may be deemed real property within a tax statute); *United States v. Town of Marlborough, New Hampshire*, 305 F.Supp. 718 (D.N.H. 1969) (a legislature has the power, through proper classification, to designate personal property as real estate

for purposes of taxation, although the property is real estate by common-law definition for all other purposes); *McCaslin v. DeCamp*, 248 Cal.App.2d 13, 56 Cal.Rtpr. 42 (1967) (for purposes of taxation, the definition of real property, expressed in tax statutes, controls irrespective of whether the tax definition conforms with definitions for real estate used outside the tax statutes); *Lantz Appeal*, 199 Pa.Super. 310, 184 A.2d 127 (1962) (a legislature can change the usually accepted definition of real estate and can designate the subjects to be assessed and taxed as real estate); *Matter of Beagell v. Douglas*, 2 Misc.2d 361, 157 N.Y.S.2d 461 (1955) (a legislature has the power to classify and define what property is taxable as real property, including property which under the common law is personal property); *Portland Terminal Co. v. Hinds et al.*, 141 Me. 68, 39 A.2d 5 (1944) (a legislature has the authority, for the purposes of taxation, to use a valid definition by which real estate shall be assessed as personalty or that personalty shall be taxed as realty).

Legislatures in other states have included within the definition of "real estate" various articles or items annexed to real estate and have utilized a definition identical or substantially similar to the definition contained in L.B. 1; for example, see, *Transcontinental Gas v. Bernards Tp.*, 111 N.J. 507, 545 A.2d 746 (1988) (gas transmission pipelines taxed as real property); *Pitre v. Louisiana Tax Com'n*, 493 So.2d 196 (La.App. 1986) (pipelines as real property for tax purposes); *Fischbach & Moore, Inc. v. State Bd., Etc.*, 117 Cal. App.3d 627, 172 Cal.Rptr. 923 (1981) (transmission lines and supporting structures properly classified as realty); *Wilmington Suburb. Water Corp. v. Board of Assess.*, 316 A.2d 211 (Del.1973) (water pipelines as real property for taxation); *Transco Corp. v. Prince William Co.*, 210 Va. 550, 172 S.E.2d 757 (1970) (gas mains classified as real property for tax purposes); *Bangor-Hydro Electric Company v. Johnson*, 226 A.2d 371 (Me.1967)

(lines of electric light and power companies defined and classified as real estate for tax purposes); *People ex rel. Holmes Elec. v. Chambers*, 1 Misc.2d 990, 125 N.Y.S.2d 436 (1953) (telegraph lines, wires, poles, and appurtenances defined as real property for tax purposes); *Railroad Co. v. Jefferson County*, 114 Kan. 156, 217 P. 315 (1923) (railroad structures); *Buffalo Gas Co. v. Volz*, 31 Misc. 160, 64 N.Y.S. 534 (1900) (tangible property of a gas corporation, consisting of mains and pipes, has no status which prevents the legislative option of defining the property as land, or as personalty, or classifying property anew); *People, ex rel. v. Com'rs of Taxes of N.Y.*, 101 N.Y. 322, 4 N.E. 127 (1886) (railroad structures as real estate); and *Board of Directors v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948) (pipelines defined as real property under Arkansas' tax law).

To maintain that only a court can define property for tax purposes, which is precisely the position of today's majority in MAPCO's case, is undeniable hubris and a claim of unique definitional capacity which is neither warranted nor countenanced under the Constitution.

Since the Legislature has the constitutional power to define types of property for taxation, the question is: Has the Legislature, in its definition of "real estate" in L.B. 1, acted reasonably, that is, consistent with reality and not arbitrarily? A very real and substantial difference separates the items of property classified as "real estate" in L.B. 1, such as pipelines and telecommunications towers, from the property excluded from "real estate," such as a center pivot irrigation system. That difference between the various items of property was described and pointed out in *Natural Gas Pipeline v. State Bd. of Equal.*, 237 Neb. 357, 390-91, 466 N.W.2d 461, 481 (1991) (Shanahan, J., dissenting):

> When used on real estate, each of the items added in the expanded definition of "real estate" in § 77-103 (Reissue 1990) is rendered immobile and becomes

> stationary as the result of some physical connection to the real estate. For instance, a pipeline is usually buried in the ground which it crosses, while structures such as electrical and telecommunications poles and towers are immobile when part of the structure is buried in the earth to support the remaining part above ground or when such items are securely fastened to buried foundations for additional support.
>
> . . . Irrigation systems used for agricultural and horticultural purposes may also consist of movable surface pipes as conduits for water sprayed from sprinklers attached to the pipes, thereby allowing mobility from one irrigation site to another. Therefore, mobility of a center pivot and other surface irrigation system distinguishes the foregoing property from those items which the Legislature has defined as "real estate" in L.B. 1.

Anyone who cannot distinguish between microwave towers and center pivot towers in an irrigation system has less than a working knowledge about center pivot irrigation systems. More than likely, a center pivot irrigation system qualifies as personal property under the common-law definition of "fixture" recognized in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). In any event, someone out there had better tell creditors who repossessed and hauled away center pivot systems from debt-ridden irrigators that those creditors have replevied real estate—quite a legal phenomenon to say the least. In the final analysis, this court's conclusion that the Legislature acted arbitrarily in defining "real estate" for L.B. 1 lacks valid and rational premises. The vice of arbitrariness, which this court now levies at the Legislature in conjunction with the legislative definition of "real estate," is the very vice infecting the majority's conclusion, which is, at most, a result without a stated reason or rational foundation.

Arbitrariness in the majority's opinion is not so disturbing as is the inexorable destiny of property classifications and tax exemptions in Nebraska. The majority's focal point is Neb. Const. art. VIII, § 1, the "uniformity" clause, that is, "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property. . . ."

However, before consideration of the majority's view on the "uniformity" clause, there is the majority's misunderstanding of *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985), a misperception which must be set straight. In *Casey's*, we observed that a statutory limitation on the number of liquor licenses was a legitimate state policy, namely, trade stability and temperance, and, therefore, a proper subject for legislation. However, as noted in *Casey's*, subsequent legislation, which eliminated restrictions on many licensees, effectively expanded the number of licenses to such a level that any restriction on the number of licensees no longer served a valid governmental interest. See *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989) (when a fundamental right or suspect classification is not involved in legislation, a legislative act is a valid exercise of a state's police power, if the act is reasonably related to a legitimate governmental interest). To adhere to the view that classification of property and tax exemptions serve no legitimate governmental purpose, which was the basis for the conclusion in *Casey's*, is so farfetched that comment is unnecessary beyond the expression that *Casey's* is absolutely inapplicable to MAPCO's case.

Also, because the majority focuses on the "uniformity" clause, another part of the Nebraska Constitution is brought to bear in MAPCO's case, namely, Neb. Const. art. VIII, § 2, which provides in part: "The Legislature by general law may exempt property owned and used exclusively for educational, religious, [or] charitable . . .

purposes. . . ." Section 2 of article VIII further provides in part: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation."

Considering the "uniformity" clause in § 1 of article VIII in relation to tax exemption authorization in § 2 of article VIII, the majority pounces on *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), in which this court held that after allowance for exemptions authorized by the Legislature pursuant to § 2 of article VIII, tangible property, which is subject to taxation, must be taxed uniformly in accordance with § 1 of article VIII. By ousting *Stahmer* from Nebraska's interpretative decisions concerning tax classifications and exemptions in relation to the uniformity clause, this court today reaches the utopian view and constitutionally indefensible position that uniformity in taxation is equated with and, therefore, requires absolute equality, since tax classifications and exemptions undermine equal treatment of property in Nebraska's tax structure. In the majority's view, since absolute equality of treatment is essential to uniformity in taxation, all tangible property must be treated the same for tax purposes, that is, taxed equally or not taxed at all. Moreover, according to the majority, Nebraska's structure of property taxation, which includes classifications and exemptions, cannot "withstand muster under federal law." That is a preview of coming attractions to be shown by this court.

None can realistically and justly contend that any within a valid class should be treated differently from the rest of the class. What, then, is the real meaning and effect of this court's disdain for classifications of property, including the distinction between taxable and exempt tangible property? Carried to the logical and inevitable conclusion, judicial rejection of classification for tangible property means that residential property must be valued

and taxed the same as commercial property; hence, a home must be valued the same as an industrial tract or a railroad's right-of-way.

What is more frightening and disconcerting is the fact that the majority, without any litigant's request or suggestion, has struck down and cut out the exemptions in Neb.Rev.Stat. § 77-202(6) to (9) (Reissue 1990) and thereby abolished 4 of Nebraska's 13 categories of tax exemptions for tangible property, action which the majority then characterizes as a "meaningful resolution to the problem presented" in MAPCO's case. While those excisions from § 77-202 may be "meaningful," by no stretch of the imagination is the majority's action a "required or plausible resolution." In a stroke of poetic justice, however, the majority has abolished the tax exemption for previously exempt business inventories of several appellants in these tax cases, and other businesses similarly situated, which have challenged the status of various tax exemptions in Nebraska's personal property tax system. Defeat is snatched from the jaws of victory.

Certainly, not many will lament the demise of tax exemptions for honeybees and fur-bearing animals, see § 77-202(9), which this court has struck down today. Although this court has taken the sting out of the bee exemption and skinned the furry animal exemption, one has to wonder what motivated the court to withhold a coup de grace to some of the other tax exemptions in § 77-202. Constitutional principle or personal predilection? For instance, § 77-202(10) provides a tax exemption for personal property of companies which qualify under Neb.Rev.Stat. §§ 77-4101 et seq. (Reissue 1990), Nebraska's Employment and Investment Growth Act, the much publicized L.B. 775 enacted in 1987. Yet, the exemption under § 77-202(10) remains unscathed and intact. There is no logical and legal reason why exemptions under L.B. 775 are not constitutionally condemned and disallowed under the majority's view and volunteered action abolishing other tax exemptions in § 77-202.

According to the majority, the Legislature has thwarted "the levy of taxes 'by valuation uniformly and proportionately upon all tangible property . . .'" as a consequence of exemptions authorized by the Constitution. If exemptions pertaining to bees, fur-bearing animals, agricultural machinery, and business inventories are judicially abolished, which is the feat accomplished by this court's majority today, what about exemptions regarding household furnishings and personal effects, which are presently tax exempt under § 77-202(1)(d)? Obviously, judicial abolition of the tax exemption for household furnishing and personal effects would hit pretty close to almost everyone's home, regardless of one's occupation or station in life. However, for the time being and for some undisclosed reason, the majority has elected to spare the "household goods and personal effects" exemption from the gratuitous chain saw surgery performed on other exemptions in § 77-202. In any event, the legacy of the majority's view is inevitable taxation of household furnishings and personal effects. It is only a matter of time, if logic has any place in the tax decisions of this court.

Then, there is the exemption for tangible property of educational, religious, and charitable organizations. In *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987), we recognized that a constitutional provision for tax exemption of property owned by a religious organization is not a matter of right, automatically extended as a self-executing right under the Nebraska Constitution, but depends entirely on legislative grace in the form of exemptive legislation. However, in the majority's view, again carried to its logical and inevitable conclusion, tax exemption for tangible property of a religious organization is anathema and subject to excommunication from the body of tax exemptions, since the majority dictates that exemptions destroy the absolute equality which is essential for acceptable uniformity in taxation of tangible property, both real and personal. The tax exemption dominoes begin to fall.

Would anyone have the audacity to challenge the present tax exemption for tangible property of a charitable, educational, or religious organization? Who would dare challenge the tax exemption of a hospital operated for charitable purposes? A university owned by an organization other than the State of Nebraska? Tangible property used exclusively for a religious purpose, even a church, synagogue, or other place of worship? Sound highly improbable, perhaps impossible? As Al Jolson quipped, "You ain't heard nothing' yet, folks."

All of which brings us back to the majority's focal point, the uniformity clause in Neb. Const. art. VIII, § 1. So long as the majority's view about classification and tax exemptions exist, the uniformity clause is irreconcilable with the constitutional authorization for tax classification and exemption from taxation. Eventually, the house of cards built on classifications and tax exemptions must collapse if the uniformity clause is to subsist and endure as viewed and desired by this court's majority. Amendatory augmentation of the Constitution, adding clause after clause and provision upon provision, while leaving the uniformity clause, as presently construed by this court's majority, at odds with tax classifications and exemptions, is quite likely no solution, but a pollyanna approach to a Nebraska crisis that will soon reach epoch-making proportions, if such level has not already been reached. If classifications related to taxation and exemptions are totally incompatible with the uniformity clause, something must give way. Since the uniformity clause, as construed by this court's majority, and all classifications and exemptions, destined to be categorically rejected by the majority of this court, are absolute contradictions in Nebraska's present tax structure, one of those aspects of Nebraska taxation, namely, the uniformity clause or classifications and exemptions, must cease so that some semblance of order is substituted for the current chaos. That decision is left to the people of Nebraska and their Legislature.

Supreme Court, U.S.
FILED
MAY 18 1993
OFFICE OF THE CLERK

No. 92-1665

In The

Supreme Court of the United States

October Term, 1992

MAPCO AMMONIA PIPELINE, INC., *et al.*,

Petitioners,

vs.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENTS IN OPPOSITION

PATRICK T. O'BRIEN #13106
BAUER, GALTER, O'BRIEN,
ALLAN & BUTLER
811 South 13th Street
Lincoln, Nebraska 68508
(402) 475-0811
Attorneys for Respondents Gage County, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Whether a remedy consisting of a refund of the difference between the tax actually levied and the tax which would have been levied if other property unconstitutionally exempted had been taxed to correct the disproportionality in Petitioners' property tax burden pursuant to the State Constitution's uniformity clause satisfies the due process requirement of the 14th Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Respondents accept Petitioners' designation of parties in the Petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	2
1. McKESSON IS NOT APPLICABLE TO THE STATE COURT PROCEEDINGS	3
2. THE STATE COURT'S DECISION IS NOT CONTRARY TO THE DECISION OF THIS COURT IN McKESSON CORP. v. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO	6
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES:

Bade v. Drachman, 4 Ariz. App. 55, 417 P. 2d 689 (1966) 9

Bohn v. Waddell, 167 Ariz. 344, 807 P. 2d 1 at 8 (1991) 6

MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization, 238 Neb. 565, 471 N.W. 2d 734 (1991) 1, 2, 4, 6

MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization, 242 Neb. 273, 494 N.W. 2d 535 (1993) 1, 4, 7, 9

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990).....*passim*

Montana National Bank of Billings v. Yellowstone County, 276 U.S. 499 (1928) 7

Siegal v. Newark, 38 N.J. 57, 183 A. 2d (1962)..... 9

Thayer v. South Carolina Tax Commission, 413 S.E. 2d 810 at 815 (S.C. 1992) 6

CONSTITUTIONAL & STATUTORY PROVISIONS:

Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11503(b)(4) (1992)..... 3, 4, 5

Nebraska Const. art. VIII, §1.....3, 4

No. 92-1665

In The

Supreme Court of the United States

October Term, 1992

MAPCO AMMONIA PIPELINE, INC., et al.,

Petitioners,

vs.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska [hereinafter "State Court"], reprinted in Appendix A to the Petition, is reported as *MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization*, 242, Neb. 273, 494 N.W. 2d 535 (1993) [hereinafter *"MAPCO II"*]. The opinion of the Nebraska State Board of Equalization and Assessment which was issued orally and subsequently transcribed in reprinted in Appendix B to the Petition. An earlier opinion of the Nebraska Supreme Court in the same case reported as *MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization*, 238 Neb. 565, 471 N.W. 2d 734 (1991)

[hereinafter *"MAPCO I"*] is reprinted in Appendix C to the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents are satisfied with the constitutional provision set forth in the Petition.

STATEMENT OF THE CASE

Respondents submit that an adequate and concise statement of the case, including all facts material to the question presented is provided in the statement of the case submitted in the Brief in Opposition of the Respondent State Board of Equalization and Assessment.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondents respectfully submit that the Petition should be denied.

I. McKESSON IS NOT APPLICABLE TO THE STATE COURT PROCEEDINGS

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990), this Court held as follows:

> When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principals long recognized by our cases require the State's post-deprivation procedure to provide a "clear and certain remedy," . . . , for the deprivation of tax moneys in an unconstitutional manner. In this case, Florida may satisfy this obligation through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.

Id. at 2258.

There are important distinctions between this case and *McKesson*. In the first place, this was a case in which the Petitioners originally sought to have the value of their personal property equalized with the value of railroad property which was not subject to taxation in Nebraska because of applications of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11503(b)(4) (1992) [the 4-R Act]. Petitioners claimed, under Article VIII, Section 1 of the Nebraska Constitution, that the

value of their personal property should be reduced to zero for purposes of taxation. In effect, this would have exempted their personal property from taxation as was the railroad personal property under the 4-R Act. If successful in their "equalization" efforts, the Petitioners would have been entitled to an adjustment in their value, and a subsequent refund of any respective portion of their personal property taxes paid during the pendency of their litigation.

The Petitioners eventually, as required by law, paid their property taxes during the course of this litigation. Nevertheless, their characterization that they "paid these taxes under compulsion *and then sought refunds on the ground that the tax unlawfully discriminated against them*" (page 2 of Petition), is not accurate, as indicated above. The Nebraska Supreme Court in *MAPCO I*, determined that equalization of the value of Petitioners' personal property at zero percent was not an appropriate remedy but indicated that they were nevertheless entitled to some remedy to correct the real problem in this case which was determined to be the "disproportionality in taxation within a class of property". Id. at 579. The court also determined that several statutory exemptions of personal property, which had created the problem under the 4-R Act with railroad property, were also unconstitutional. The court made no determination that Petitioners' property taxes nor any portion thereof were unconstitutional.

In *MAPCO II* the court affirmed the subsequent action of the State Board of Equalization and Assessment on remand correcting "the disproportionality in taxation of appellant's property within the class of all tangible property in compliance with Article VIII, Section 1 of the

Nebraska Constitution and the due process clause of the 14th Amendment to the U.S. Constitution." Id. at 266, 267. The State Court also considered *McKesson* and determined that the remedy adopted by the Board nonetheless conformed with *McKesson*.

As indicated, this is not a case in which Petitioners brought this action in the first place seeking a refund because of a requirement to pay their taxes prior to obtaining a review of their validity. It also did not arise under the Commerce Clause of the United States Constitution. It thus did not involve, as in *McKesson*, a favored class of taxpayers and an unfavored class of taxpayers that suffered an economic disadvantage by virtue of the fact that the two classes were commercial competitors. The present case involved a property tax system and several exemptions from that property tax, including what amounted to an exemption for railroad personal property by virtue of the application of the 4-R Act. There were taxpayers who benefited from these exemptions by the lack of inclusion of the value of this property in their property tax base. All other taxpayers including the owners of residential, agricultural and business property, both personal and real, as well as Petitioners, were "disadvantaged" by such exemptions.

A few taxpayers, including the Petitioners, sought to benefit themselves by a reduction in the value of their property tax base by seeking what, in effect, amounted to a court mandated exemption of their personal property from taxation. The court rejected that relief. As recognized by the Nebraska Supreme Court, the disparity in this situation is clearly not one of economic disadvantage between commercial competitors, but lies in the fact that

all taxpayers will pay higher taxes as a result of the nontaxation of certain property in relation to the entire class of real and personal property. See also *Bohn v. Waddell*, 167 Ariz. 344, 807 P. 2d 1 at 8 (1991).

Furthermore, unlike *McKesson*, this was not a case in which Petitioners' tax itself was declared unconstitutional. Rather, the Nebraska Supreme Court in *MAPCO I*, determined that certain statutory exemptions were unconstitutional. The property tax that had been otherwise levied on Petitioners and all other taxpayers was nonetheless constitutional. See *Thayer v. South Carolina Tax Commission*, 413 S.E. 2d 801 at 815 (S.C. 1992). Finally, unlike the state solution adopted in *McKesson*, which amounted to no remedy at all, Petitioners here did receive meaningful relief as will be discussed further herein. See *Bohn v. Waddell, supra*, at 3 and 8.

Thus, the specific circumstances found in *McKesson* do not exist in the present case. While the Nebraska Supreme Court nevertheless determined that *McKesson* was complied with in this case, *McKesson* is not really applicable in this circumstance. *Thayer v. South Carolina Tax Commission, supra*, at 815; and *Bohn v. Waddell, supra*, at 6 and 8.

II. THE STATE COURT'S DECISION IS NOT CONTRARY TO THE DECISION OF THIS COURT IN McKESSON CORP. V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO.

By correcting the disproportionality in taxation experienced by the Petitioners in this case in the manner affirmed by the Nebraska Supreme Court, the Petitioners

were nevertheless treated fairly and in compliance with the provisions of *McKesson*. In *McKesson*, the court effectively authorized a spectrum of potential remedies for taxpayers. Id. at 2258. *McKesson* did not require, as asserted by Petitioners that the tax burdens in every event "must be equalized" (Petition, page 7). Rather, the court stated that the due process clause is satisfied "so long as the resulting tax actually assessed during the contested tax period reflects a scheme that does not discriminate against *interstate commerce* . . . " Id. at 2252 (emphasis added). As noted, this case does not deal with any unconstitutional discrimination against interstate commerce, but rather the question of disproportionality in state property taxation.

In effect, the action affirmed by the State Court amounts to "a refund of the excess tax paid" paid by the Petitioners in order to remove this disparity in taxation. This is comparable to the remedy suggested in *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928). As recognized by the State Court in *MAPCO II*, the excess tax in this case was not measured soley by the fact that some taxpayers escaped taxation because of the exemption of their property, but rather was measured by "the difference between the taxes levied against the property of the appellants and taxes which the appellants would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed." Id. at 266. This remedy satisfies the due process concerns of *McKesson*.

It is likewise a meaningful retroactive remedy as required by *McKesson*, and in addition provides a more substantial degree of fairness among all taxpayers.

Whereas, if the State Court had granted the relief requested by the Petitioners, it would simply have increased the amount of "discrimination" against the remaining taxpayers. Nothing in *McKesson* requires that these Petitioners receive more favorable treatment than the remaining taxpayers through the total elimination of their personal property tax under and otherwise constitutional tax scheme in order to satisfy due process and equal protection requirements of the United States Constitution.

Likewise, this situation is not at all similar to the "hypothetical scheme" adopted by the state of Florida and rejected by this court in *McKesson*. That so called "hypothetical scheme" was, in effect, a thinly veiled attempt to retain in place a tax scheme that had already been invalidated, and resulted in no remedy at all. The "hypothetical scheme" in *McKesson* amounted to an argument by the state that it would have imposed a higher tax rate on all distributors had it known the present law would be declared unconstitutional, and because the petitioner would have been in the same tax position under these hypothetical circumstances, it is not now entitled to a refund of any of the taxes that it actually paid. That it is not at all analogous to what the State Court accepted as an appropriate remedy in the markedly different circumstances existing in the Nebraska case. In this case, the State Board of Equalization and Assessment had developed a methodology by which the "excess taxes actually paid" by the Petitioners could actually be measured and refunded to them as required by *McKesson*, thus meeting the due process requirements of the 14th Amendment and providing meaningful relief.

The remedy adopted by the State Court, is likewise similar to remedies adopted by other courts in property tax cases. See *Siegal v. Newark*, 38 N.J. 57, 183 A. 2d (1962); and *Bade v. Drachman*, 4 Ariz. App. 55, 417 P. 2d 689 (1966). While those cases involved reductions in levels of assessments, the principles involved are nevertheless analogous and applicable to the remedy adopted by the State Court in *MAPCO II*. As a consequence, it should be apparent that the decision of the State Court in this case, particularly when considering the significant differences existing here, is consistent with the principles set forth by this Court in *McKesson*. The State Court decision, therefore, is not contrary to the decision of this Court in *McKesson*.

CONCLUSION

The petition for writ of certiorari should be denied.

GAGE COUNTY, et al, Respondents

PATRICK T. O'BRIEN, #13106
BAUER, GALTER, O'BRIEN,
ALLAN & BUTLER
811 South 13th Street
Lincoln, NE 68508
(402) 475-0811
Attorneys for Respondents

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

No. 92-1665

In The

Supreme Court of the United States

October Term, 1992

MAPCO AMMONIA PIPELINE, INC., et al.,

Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENT STATE BOARD OF EQUALIZATION AND ASSESSMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DON STENBERG
Attorney General

L. JAY BARTEL
Assistant Attorney General
(Counsel of Record)
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682

Attorneys for Respondent State Board

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondent State Board of Equalization and Assessment restates the Question Presented as follows:

Whether, in order to correct disproportionate taxation of property, a remedy consisting of a refund of the difference between the tax actually levied and the tax which would have been levied if other property unconstitutionally exempted had been taxed satisfies the due process clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners' list of parties to the proceedings is acceptable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING THE WRIT	5
A. McKesson Is Not Applicable	6
B. The State Court's Decision is Consistent with McKesson	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES CITED:

American Trucking Assns, Inc. v. Smith, 496 U.S. 167 (1990) 13

Amoco Pipeline Co. v. State Bd. of Equal., 242 Neb. 273, 494 N.W.2d 541 (1993) 15

Atchison, T. & S.F. Ry. v. O'Connor, 223 U.S. 280, 285 (1912) 6

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) 11

Bade v. Drachman, 4 Ariz. App. 55, 417 P.2d 689 (1966) 8

Bohn v. Waddell, 167 Ariz. 344, 807 P.2d 1 (Ariz. Tax 1991), vacated on other grounds sub nom. Estate of Bohn v. Waddell, ___ Ariz. ___, 848 P.2d 324 (Ariz. App. 1992), review denied (April 13, 1993), petition for cert. filed (U.S. April 30, 1993) (No. 92-1748) 10, 11

James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S. Ct. 2439 (1991) 10

Kearney Convention Center v. Buffalo Cty. Bd. of Equal., 216 Neb. 292, 344 N.W.2d 620 (1984) 9

MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991) .. *passim*

MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal., 242 Neb. 263, 494 N.W.2d 535 (1993) .. *passim*

McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990) ..... *passim*

Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991) 3

TABLE OF AUTHORITIES – Continued

Page

Northern Natural Gas Co. v. State Bd. of Equal., 232 Neb. 806, 443 N.W.2d 249 (1989), cert. denied 493 U.S. 1078 (1990) 9

Siegal v. Newark, 38 N.J. 57, 183 A.2d 21 (1962) 8

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923) 9

Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974) 3

Thayer v. South Carolina Tax Comm'n, 413 S.E.2d 810 (S.C. 1992) 14

United States v. Estate of Donnelly, 397 U.S. 286 (1970) 10

STATUTES CITED:

28 U.S.C. § 1257 2

Neb. Rev. Stat. § 77-202(6)-(9) (1990) 3, 4, 11

Neb. Rev. Stat. § 77-505 (Cum. Supp. 1992) 2

Neb. Rev. Stat. § 77-801.01 (1990) 2

Neb. Rev. Stat. § 77-802 (1990) 2

Neb. Rev. Stat. § 77-1727 (1990) 7

Neb. Rev. Stat. § 77-1735 (1990) 7

Neb. Rev. Stat. § 77-1736.04 (1990) 7

OTHER CITATIONS:

U.S. Const. amend. XIV 5, 6

Neb. Const. art. VIII, § 1 ..... 3, 4, 5, 7, 8

No. 92-1665

In The

Supreme Court of the United States

October Term, 1992

MAPCO AMMONIA PIPELINE, INC., et al.,

Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF OF RESPONDENT STATE BOARD OF EQUALIZATION AND ASSESSMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Nebraska Supreme Court [hereinafter "State Court"] is reported as ***MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal.***, 242 Neb. 263, 494 N.W.2d 535 (1993) *[MAPCO II]*. A previous opinion of the Nebraska Supreme Court in the same case is reported as ***MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal.***, 238 Neb. 565, 471 N.W.2d 734 (1991) *[MAPCO I]*. The

opinions of the State Court are reprinted in the Appendix to the Petition.

JURISDICTION

Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The text of the due process clause of the Fourteenth Amendment is reprinted in the Petition. (Pet. Cert. at 2).

STATEMENT OF THE CASE

Petitioners are four companies which own, maintain, and operate pipeline transmission systems in Nebraska. Petitioners are public service entities whose property is valued for tax purposes by the State Tax Commissioner and equalized by the State Board of Equalization ["State Board"]. Neb. Rev. Stat. §§ 77-801.01, 77-802 and 77-505 (1990 and Cum. Supp. 1992).

In August, 1990, Petitioners appeared before the State Board and requested "equalization" of their property "(1) with railroad rolling stock, which had been exempted from taxation . . . and (2) with center pivot and other irrigation systems used for agricultural purposes and equipment and machinery used for business purposes . . . . " ***MAPCO I,*** 238 Neb. at 567, 471 N.W.2d at 737. The State Board denied Petitioners' requests. ***Id.*** at 568, 471

N.W.2d at 737. On appeal, the State Court reversed. *Id.* at 585, 471 N.W.2d at 747. The State Court declared unconstitutional the redefinition of real property contained in LB 1 (*codified at* Neb. Rev. Stat. § 77-103 (1990)), and reaffirmed its finding in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991) that the exemption of railroad rolling stock in LB 7 (*codified at* Neb. Rev. Stat. § 77-202(11) (1990)) was unconstitutional. 238 Neb. at 570-76, 471 N.W.2d at 738-742. Addressing the relief to which Petitioners were entitled, the State Court rejected Petitioners' claim that they should be "'equalized' at zero percent" because railroad rolling stock was not taxed. *Id.* at 577, 471 N.W.2d at 742. The State Court held that "[t]he process of equalization . . . [could not] be applied to property that is not taxed." *Id.* Thus, the State Court determined that Petitioners' remedy was "not for their property to be 'equalized' at zero percent, but for it to be taxed uniformly and proportionately in compliance with Neb. Const. art. VIII, § 1." *Id.* at 583, 471 N.W.2d at 746.

The State Court continued, noting that, "[i]n their apparent zeal to avoid taxation entirely," Petitioners had not challenged the constitutionality of the tax exemptions contained in Neb. Rev. Stat. § 77-202 (1990). The State Court then went on, *sua sponte*, to hold unconstitutional exemptions for personal property contained in Neb. Rev. Stat. § 77-202(6)-(9) (1990), and overruled its previous decision in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), which had upheld as legitimate classifications the exemptions for agricultural income-producing machinery and equipment, agricultural products, and business inventories in § 77-202(6)-(9). *Id.* at 581-85, 471 N.W.2d at

744-46. The State Court held that the property tax exemptions in § 77-202(6)-(9) were "unconstitutional under Neb. Const. art. VIII, § 1 in that they prevent the levy of taxes 'by valuation uniformly and proportionately upon all tangible property and franchises.'" *Id.* at 585, 471 N.W.2d at 747. The State Court reversed the order of the State Board, and remanded the cause "with directions to assess the property of the [Petitioners] and equalize its value as required by article VIII, § 1 of the Nebraska Constitution and the applicable statutes." *Id.*

On remand, the State Board remedied the disproportionate taxation of Petitioners property resulting from the determination of the unconstitutionality of the tax exemptions in § 77-202(6)-(9) and (11) by reducing Petitioners' taxable values for 1990 by a percentage calculated by comparison of the total value of tangible property with the total value of property not taxed and declared to be unconstitutionally exempted in *MAPCO I*. This resulted in an order by the State Board reducing Petitioners' unit values for tax year 1990 by 18.81 percent. *MAPCO II*, 242 Neb. at 265, 494 N.W.2d at 537.

On appeal, the State Court affirmed the order of the State Board. *MAPCO II*, 242 Neb. at 267, 494 N.W.2d at 538. The State Court found that the remedy provided by the State Board conformed with the Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990), by providing "a refund of the difference between the taxes levied against the property of the [Petitioners] and the taxes which the [Petitioners] would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed."

MAPCO II, 242 Neb. at 266, 494 N.W.2d at 537. The majority opinion further stated:

> We believe the relief ordered by the State Board corrects the disproportionality in the taxation of [Petitioners'] property within the class of all tangible property in compliance with article VIII, § 1 of the Nebraska Constitution and the Due Process Clause of the 14th Amendment to the U.S. Constitution. The actual disproportionality borne by the [Petitioners] is not measured by the fact that certain property escaped taxation, but by the effect of the nontaxation of certain property in relation to the class of all real and personal property. The [Petitioners] have been provided a remedy which assures that they are obligated to pay no more than their fair share of the total property tax burden, which is the amount they would have paid if the State had properly included all property on the tax rolls that should have been taxed.

Id. at 266-67, 494 N.W.2d at 537-38.

REASONS FOR DENYING THE WRIT

As the Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court, the Petition should be denied.

I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING THE WRIT.

Petitioners' sole argument as to why the Court should accept this case and reverse the ruling of the State

Court is that the decision below assertedly conflicts with this Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990). While the State Court relied on *McKesson*, the Court's decision in that case is not applicable in this case. Moreover, even if *McKesson* is applicable, the remedy provided Petitioners satisfies the due process clause of the Fourteenth Amendment.

A. *McKesson* Is Not Applicable.

In *McKesson*, the Court held that, if a state penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review later, the due process clause requires that the state afford a "'clear and certain remedy' . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." 496 U.S. at 39 (*quoting Atchison, T. & S.F. Ry. v. O'Connor*, 223 U.S. 280, 285 (1912) (footnote omitted)). The tax at issue was an excise tax that gave preferential treatment to beverages manufactured from Florida-grown crops bottled in the state, which was found to discriminate against interstate commerce because of its preference for distributors of local products. The Court found that the remedy to distributors for having to pay taxes higher than those paid by favored competitors could consist of a refund of the excess tax paid by distributors; a retroactive assessment of the tax on favored competitors; or a combination of a partial refund and a partial retroactive assessment. *Id.* at 39-41.

While relied upon by the State Court, *McKesson* is distinguishable from the case at bar. First, while Petitioners characterize the proceedings below as "refund actions" seeking post-payment recovery of taxes (Pet. Cert. at 2, 8), the claims raised by Petitioners before the State Board sought equalization of the valuations of Petitioners' property. While Nebraska law in effect at the time Petitioners asserted their equalization claims provided procedures for taxpayers to maintain refund actions following payment of property taxes on grounds of illegality or unconstitutionality, Neb. Rev. Stat. §§ 77-1735 and 77-1736.04 (1990), Petitioners did not proceed in this manner. In addition, at that time, Nebraska law permitted the enjoining of property taxes "levied or assessed for illegal or unauthorized purpose[s]." Neb. Rev. Stat. § 77-1727 (1990). While the reduction in Petitioners' valuations by the State Board will ultimately translate into a refund of excess taxes paid, the proceedings in this case do not involve a post-payment refund action, as alluded to by Petitioners.

Second, unlike *McKesson*, the State Court did not hold that the taxes imposed on Petitioners' property were unconstitutional. Rather, the State Court held that various exemptions provided under Nebraska law were unconstitutional as violating the uniformity requirement of Neb. Const. art. VIII, § 1. The court below recognized that, in light of its decision, Petitioners' "unitary value, including both real and personal property, might need to be adjusted so as to achieve uniformity and proportionality of taxation in compliance with" art. VIII, § 1, *MAPCO I*, 238 Neb. at 579, 471 N.W.2d at 743, and remanded the case to the State Board "with directions to

assess the property of the [Petitioners] and equalize its value as required by article VIII, § 1, of the Nebraska Constitution and the applicable statutes." *Id.* at 585, 471 N.W.2d at 747. The remedy provided was to adjust Petitioners' valuations so as to take into account the effect of the unconstitutionally exempted property on the class of all tangible property subject to equalization under the State Constitution. ***MAPCO II,*** 242 Neb. at 266-67, 494 N.W.2d at 537-38. The State Court found "[t]he relief ordered by the State Board correct[ed] the disproportionality in the taxation of [Petitioners'] property within the class of all tangible property in compliance with article VIII, § 1 of the Nebraska Constitution. . . . " *Id.* at 266, 494 N.W.2d at 537.

The proceedings below thus involved the remedy to be provided for disproportionate taxation of property under the State Constitution resulting from a judicial declaration that certain tax exemptions were unconstitutional. The tax imposed on Petitioners' property, however, was not declared unconstitutional. The measure of relief approved by the State Court is similar to that which has been accepted and adopted in other jurisdictions where disproportionate assessments of property are established. *See Bade v. Drachman,* 4 Ariz. App. 55, ___, 417 P.2d 689, 697 (1966) (relief from overassessment of property "is to be taxed only to the extent of a fair share of the tax burden. . . . "); *Siegal v. Newark,* 38 N.J. 57, ___, 183 A.2d 21, 23 (1962) (remedy provided to taxpayer for overassessment of property is "a reduction of his assessment to the 'common level' of assessments in the taxing district."). The State Court's determination of the remedy

required to cure the violation of the uniformity requirement of the State Constitution presents a remedial issue different than that addressed by the Court in *McKesson*.[1]

Third, while Petitioners downplay the significance of the Commerce Clause violation in relation to the Court's discussion in *McKesson* of the options available to the

---

[1] Petitioners argued below that the remedy provided was inconsistent with Nebraska Supreme Court decisions addressing the remedy required when certain taxable property within a class is undervalued in comparison with the value placed on other property in the same class. Those cases involved a remedy for failure to equalize valuations of property in the same class by reducing or lowering the value of the complaining taxpayer's property to the level at which the lower valued class or type of property was taxed. *E.g., Kearney Convention Center v. Buffalo Cty. Bd. of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *see also Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). As the State Court properly determined, however, "equalization" relief of this nature was inappropriate, as "[t]he process of equalization . . . cannot be applied to property that is not taxed." *MAPCO I*, 238 Neb. at 577, 471 N.W.2d 742. None of the precedents relied upon by Petitioners dealt with the relief to be provided taxpayers due to the overassessment of property resulting from exemptions later declared unconstitutional.

Petitioners also assert that the State Court would have reached the same result employed in its prior equalization cases by applying the equal protection clause of the Fourteenth Amendment, referencing the State Court's prior decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S. 1078 (1990). (Pet. Cert. at 9-10). This ignores the fact that the State Court's decision that the exemptions in Neb. Rev. Stat. § 77-202(6)-(9) were unconstitutional was grounded solely on the State Constitution, and that the State Court specifically repudiated "any language" in its *Northern* opinion regarding the applicability of "equalization" principles in this case. *MAPCO I*, 238 Neb. at 577, 471 N.W.2d at 742.

State of Florida to provide a remedy in compliance with due process, the Court's decision reveals that it "felt that McKesson's injury flowed, not from the fact that it had to pay more than the favored taxpayers, but from the fact that as a result it experienced and suffered an economic disadvantage because the favored taxpayers were commercial competitors." ***Bohn v. Waddell,*** 167 Ariz. 344, 351, 807 P.2d 1, 8 (Ariz. Tax 1991), ***vacated on other grounds sub nom. Estate of Bohn v. Waddell,*** ___ Ariz. ___, 848 P.2d 324 (Ariz. App. 1992), ***review denied*** (April 13, 1993), ***petition for cert. filed*** (U.S. April 30, 1993) (No. 92-1748). The Court was concerned with the "relative disadvantage" imposed on certain distributors, noting that, absent a remedy which placed McKesson in "the position actually occupied by [McKesson's] favored competitors," the Commerce Clause violation would be perpetuated. ***McKesson,*** 496 U.S. at 42. This circumstance is not present in the instant action.

Finally, Justice Souter's opinion in the Court's later decision in ***James B. Beam Distilling Co. v. Georgia,*** ___ U.S. ___, ___, 111 S. Ct. 2439, 2448 (1991), suggests that courts may exercise remedial discretion in cases in which new rules are retroactively applied. In remanding ***Beam*** to the state court, Justice Souter noted that the court could consider "reliance interests entitled to consideration" in fashioning appropriate relief, "a matter with which ***McKesson*** did not deal." ***Id. (citing United States v. Estate of Donnelly,*** 397 U.S. 286, 296 (1970) (Harlan, J., concurring)). Such reliance interests are plainly present in this case. ***MAPCO I*** overturned a 1974 decision of the Nebraska Supreme Court which had upheld the validity

of the exemptions in § 77-202(6)-(9), "thereby dramatically and essentially changing the previous and long-standing view of the Legislature's tax exemption power. . . . " *MAPCO II*, 242 Neb. at 270, 494 N.W.2d at 540 (Shanahan, J., dissenting). The State Court properly fashioned meaningful relief by adjusting Petitioners' unit valuations to assure that, in light of the unexpected and unanticipated declaration of the invalidity of exemptions previously granted, Petitioners were "obligated to pay no more than their fair share of the total property tax burden. . . . " *MAPCO II*, 242 Neb. at 267, 494 N.W.2d at 537.[2]

In light of these distinctions, while the State Court relied on *McKesson*, the Court's decision in that case is not, in fact, controlling in this action. Based on these differences, the Court should decline to grant Petitioners'

---

[2] *McKesson* is distinguishable for a further reason. Although Florida contended the invalidity of its tax was not "clearly foreshadowed" by prior Supreme Court decisions, it is apparent that the Court considered the Florida scheme as nothing but "a thinly veiled attempt to retain in place a tax scheme that had been invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). *McKesson*, 110 S.Ct. at 2255." *Bohn v. Waddell*, 807 P.2d at 8. While "Florida should have known that its scheme was a constitutional violation," *id.*, Nebraska could not have known that the State Court would, *sua sponte*, invalidate exemptions which it had previously found constitutional. Indeed, if the State Court erred, it was wrong in *MAPCO I* by giving retroactive effect to its decision, as opposed to giving its decision only prospective effect. *MAPCO II*, 242 Neb. at 267-271, 494 N.W.2d at 538-90 (Shanahan, J., dissenting). Petitioners can hardly complain that the State has given them no "meaningful backward-looking relief," *McKesson*, 496 U.S. at 31, when, under established federal constitutional principles, no retroactive relief was required.

request for plenary review based on the alleged "misapplication" of *McKesson* by the State Court.

B. The State Court's Decision is Consistent with McKesson.

The State Court, in assessing the propriety of the remedy provided Petitioners by the State Board, did evaluate the relief granted in light of this Court's decision in *McKesson*. The State Court stated that, in *McKesson*,

> [t]he Court noted that the State might choose to erase the property deprivation by providing the taxpayer with a full refund of the tax payments, or the State could cure the invalidity by refunding the difference between the tax paid and the tax which would have been paid if all taxpayers had been treated equally. Alternatively, the Court held that the State might assess and collect back taxes from taxpayers who had received unlawful benefits or it might utilize a combination of partial refunds and partial retroactive assessments of tax increases.

MAPCO II, 242 Neb. at 266, 494 N.W.2d at 537.

The State Court concluded that "[t]he remedy which the State Board selected in this case conforms to the second method – a refund of the difference between the taxes levied against the property of the [Petitioners] and the taxes which the [Petitioners] would have been required to pay if all of the exempt property in question had been placed on the tax rolls and taxed." *Id.*

Petitioners assert that the remedy approved by the State Court contravenes an alleged "core equalization

requirement" between favored and disfavored taxpayers. (Pet. Cert. at 7-8). Petitioners further claim that the relief granted "is substantively identical to the 'hypothetical scheme' specifically rejected in *McKesson*." (Pet. Cert. at 9). Petitioners are wrong on both counts.

First, as noted previously, the Court's emphasis in *McKesson* on the need for the relief provided to place McKesson in the same position as the favored taxpayers was rooted in the fact that such a remedy was necessary to cure the competitive disadvantage placed on the taxpayer by the favored tax treatment accorded its competitors. It is this element of competitive disadvantage and desire to remedy the underlying Commerce Clause violation that lies at the heart of the Court's discussion in *McKesson* of the types of retroactive relief required by the due process clause to cure a constitutional violation of this nature. This circumstance does not, of course, exist here.

If McKesson is applicable, the remedial approach approved by the State Court does, in fact, satisfy the standards set forth in that case "by refunding to [Petitioners] the difference between the tax [they] paid and the tax [they] would have been assessed" if the property exempted under the statute declared unconstitutional had been taxed. *McKesson,* 496 U.S. at 40. *See also American Trucking Assns, Inc. v. Smith,* 496 U.S. 167, 206n.2 (1990) (*McKesson* "makes clear that the Federal Constitution does not **require** the State to refund the entire tax that was unconstitutionally exacted from petitioners, but only to refund the discriminatory portion or otherwise adjust the tax to render it non-discriminatory.") (Stevens, J., dissenting) (Emphasis in original)). This is precisely

what the remedy approved by the State Court does. It provides Petitioners with a refund of the excess tax paid resulting from the effect of the State Court's declaration of the unconstitutionality of certain tax exemptions in relation to the class of all tangible property. This remedy "assures that [Petitioners] are obligated to pay no more than their fair share of the total property tax burden, ..." *MAPCO II*, 242 Neb at 267, 494 N.W.2d at 537. *McKesson* requires the State to do no more.

Petitioners' further claim that the relief provided is no different than the "hypothetical tax scheme" rejected in *McKesson* is equally misplaced. There is nothing "hypothetical" about the relief provided to Petitioners. Unlike the "hypothetical tax scheme" rejected in *McKesson*, which resulted in no remedy at all, the remedy approved by the State Court results in actual relief in the form of a reduction of the taxable values of Petitioners' property, which, in turn, will result in refunds of the excess taxes paid by Petitioners due to the nontaxation of unconstitutionally exempted property. The relief afforded Petitioners constitutes "meaningful backward-looking relief . . . ," *McKesson*, 496 U.S. at 31, and is consistent with other decisions addressing the relief to be provided for the overassessment of property. *See Bade v. Drachman*, 4 Ariz. App. 55, 417 P.2d 689 (1966); *Siegal v. Newark*, 38 N.J. 57, 183 A.2d 21 (1962).[3]

---

[3] Petitioners contend the South Carolina Supreme Court's decision in *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810 (S.C. 1992), represents another "blatant refusal" by a state court to honor *McKesson*, which "should not go unchecked." (Pet. Cert. at 10-11). Whatever else may be said about *Thayer*, it is clear that the State Court, in this case, did not deny Petitioners

Finally, while Petitioners assert that "[t]his case involves a clear-cut misapplication of the decision in *McKesson*" (Pet. Cert. at 2), it is noteworthy that forty-six other taxpayers presenting equalization claims to the State Board were provided the identical relief as that afforded Petitioners, which relief was approved by the State Court in a companion case to *MAPCO II*. *Amoco Pipeline Co. v. State Bd. of Equal.*, 242 Neb. 273, 494 N.W.2d 541 (1993). None of these taxpayers sought review of the State Court's decision by petition for a writ of certiorari. If the State Court's decision constitutes a "blatant" and "clear-cut" misapplication of *McKesson*, it is difficult to understand why none of the taxpayers provided the same relief as Petitioners have challenged the State Court's action. In actuality, the absence of a similar challenge by any of these taxpayers reflects their understanding of the propriety of the State Court's decision.

---

retrospective relief. To the extent *McKesson* is applicable, the State Court provided Petitioners all the relief to which they are constitutionally entitled.

CONCLUSION

Petitioners' request for summary reversal, as well as their request that the petition be granted, should be denied.

STATE BOARD OF EQUALIZATION
AND ASSESSMENT, Respondent,

By DON STENBERG
Attorney General

By L. JAY BARTEL
Assistant Attorney General
(Counsel of Record)
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Attorneys for Respondent State Board

SUPREME COURT, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 92-1665

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MAPCO AMMONIA PIPELINE, INC., *et al.*,
Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Nebraska Supreme Court

---

REPLY BRIEF FOR PETITIONERS

JOEL I. KLEIN
KLEIN, FARR, SMITH, & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

WILLIAM R. JOHNSON
(Counsel of Record)
KENNEDY, HOLLAND, DELACY & SVOBODA
10306 Regency Parkway Drive
Omaha, NE 68114
(402) 397-0203

WILSON - EPES PRINTING CO., INC. - 789 0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 2
Bade v. Drachman, 417 P.2d 689 (Ariz. Ct. App. 1966) 4
Bohn v. Waddell, 807 P.2d 1 (Ariz. Tax 1991), *vacated on other grounds sub nom. Estate of Bohn v. Waddell*, 848 P.2d 324 (Ariz. Ct. App. 1992), *petition for cert. filed*, No. 92-1748 (U.S. Apr. 30, 1993) 5
Heckler v. Campbell, 461 U.S. 458 (1983) 3
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 3
McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) ..... *passim*
Montana Nat'l Bank v. Yellowstone County, 276 U.S. 499 (1928) 2
Natural Gas Pipeline Co. v. State Bd. of Equalization, 466 N.W.2d 461 (Neb. 1991) 6
Northern Natural Gas Co. v. State Bd. of Equalization, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990) 6
Siegal v. Newark, 183 A.2d 21 (N.J. 1962) 4

Statutory Provisions:

Neb. Rev. Stat. § 77-1727 (Reissue 1990) 3
§ 77-1735 (Reissue 1990) 3
§ 77-1736.04 (Reissue 1990) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1665

MAPCO AMMONIA PIPELINE, INC., *et al.*,
Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Nebraska Supreme Court

---

REPLY BRIEF FOR PETITIONERS

We demonstrated in the petition that, by refusing to remedy the inequality resulting from an unlawfully discriminatory property tax statute, the Nebraska Supreme Court clearly misapplied the due process requirements set out in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Tacitly acknowledging this point, respondents principally argue—in direct contradiction to the decision below—that *McKesson* has no applicability here. They also make the obligatory nod in the direction of justifying the Nebraska Supreme Court's decision as written. Neither effort provides any basis for denying the petition.[1]

---

[1] Although the State respondents and the local government respondents have filed separate oppositions, their arguments are largely identical. We will generally cite the State's arguments in our reply, while referring to "respondents" collectively, except when only one respondent makes an argument.

1. Reversing the order in respondents' oppositions, we begin by addressing their argument concerning the application of *McKesson*: that is the case, after all, that the Nebraska Supreme Court purported to apply. Respondents offer not a shred of reasoning or analysis to rebut our core argument that *McKesson* requires unlawful tax discrimination to be remedied retroactively, by equalizing the *actual* taxes paid by favored and disfavored taxpayers—either through a refund to disfavored taxpayers, a retroactive tax increase on favored taxpayers, or some combination of the two. *See* Pet. at 7-8. Indeed, the only authority cited by the State to support its contrary reading of *McKesson* agrees with our position. Thus, the State quotes from Justice Stevens' dissent in *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 206 n.2 (1990), to the effect that *McKesson* "does not *require* the State to refund the entire tax that was unconstitutionally exacted from petitioners, *but only to refund the discriminatory portion or otherwise adjust the tax to render it non-discriminatory*." State Opp'n at 13 (second emphasis added). That straightforward requirement was not followed here. The "remedy" approved by the Nebraska Supreme Court did *not* make the tax non-discriminatory; rather it perpetuated (even if it slightly lessened) the unlawful discrimination between petitioners' taxes, which, after the remedy, still remained substantial, and the comparable "tax" on railorads, which, after the remedy, still remained at zero. That discriminatory result cannot be squared with *McKesson*.[2]

2. Obviously unable to defend the Nebraska Supreme Court's application of *McKesson*, respondents attempt

---

[2] The local respondents incorrectly assert that *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928), upheld a "comparable" remedy. Local Resp'ts Opp'n at 7. That case held that a *full* refund was required, expressly stating that the State must "bring about an equality" to remedy the discrimination caused by an unlawful tax.

mightily to argue that *McKesson* is inapposite, offering four grounds for distinguishing it. Three of those arguments were not even raised below and thus cannot properly be relied on here. *See, e.g., Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (citing *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)). All four arguments are meritless.

a. Respondents first suggest that *McKesson* does not apply here because Nebraska law did not require petitioners to "pay first and obtain review of the tax's validity later." *McKesson*, 496 U.S. at 22. That argument was not presented below and is flatly wrong. Indeed, respondents never say otherwise, but instead talk vaguely around the issue—in a transparent effort to confuse, not clarify, it. The simple truth is that petitioners could not have prevented the State from collecting their taxes, which is the kind of *pre*deprivation remedy that is necessary to take a tax challenge outside the remedial strictures of *McKesson*. *See* pp. 4-5, *infra*. In fact, Nebraska law affirmatively *bars* an injunction against tax collection, except in one narrow circumstance: when the tax is "levied or assessed for [an] *illegal or unauthorized purpose*." Neb. Rev. Stat § 77-1727 (Reissue 1990) (emphasis added). The property tax levied on petitioners, quite plainly, was not for such a proscribed purpose. Respondents do not, because they cannot, claim otherwise. The legal flaw in the tax was that it was discriminatory. That kind of challenge is indisputably not subject to a predeprivation remedy in Nebraska.[3]

---

[3] The State also cites Neb. Rev. Stat. §§ 77-1735 and 77-1736.04 (Reissue 1990) as potential alternative remedies. But these provisions, as the State itself acknowledges, here would authorize only "refund actions" (State Opp'n at 7), and thus do not render *McKesson* inapplicable. In any event, section 77-1735 would have required multiple (county-by-county) litigation and only applies to taxes levied for an "unauthorized purpose," which is not this tax; and section 77-1736.04 is, in fact, part of the remedial option properly pursued by petitioners.

b. Respondents' second argument, also not raised below, is that "unlike *McKesson*, the State Court did not hold that the taxes imposed on Petitioners' property were unconstitutional. Rather, the State Court held that various exemptions provided under Nebraska law were unconstitutional . . . ." State Opp'n at 7. This argument rests on an obvious misunderstanding of *McKesson* in particular, and the nature of discrimination claims, in general. The flaw in the excise tax at issue in *McKesson* —exactly like the flaw in the property tax at issue here— is the State's failure to treat two groups of taxpayers equally. When such discrimination occurs, it makes no sense to say, as the State does, that the tax is lawful, but the exemption is unlawful. Rather, it is the *distinction* between the two groups that is unlawful; and the remedy for such a distinction, as *McKesson* held, is retroactive equality in terms of taxes actually paid. *See McKesson*, 496 U.S. at 38-41 (distinguishing between taxes that are discriminatory and taxes that are beyond the State's power to impose).[4]

c. In the one diversionary argument that they did raise below, petitioners attempt to limit *McKesson* to Commerce Clause cases. As we demonstrated in the petition, however, *McKesson*'s remedial requirement is based on the due process clause and grows out of the unique post-deprivation remedial approach that States

[4] Respondents rely on *Bade v. Drachman*, 417 P.2d 689, 697 (Ariz. Ct App. 1966), and *Siegal v. Newark*, 183 A.2d 21, 23 (N.J. 1962), to support their misguided argument. State Opp'n at 8. Not surprisingly, the cases are inapposite; they involve property that is overassessed by the tax assessor, whose valuation is successfully challenged, which then necessitates a remedy that lowers the assessment to an appropriate level, based on what other taxpayers actually paid. The only dispute in those cases is which taxpayers are comparable, for assessment purposes, to the successful plaintiffs. Here, the comparable taxpayers, as the Nebraska Supreme Court held in *MAPCO I*, are the railroads, which pay nothing. In any event, neither of the cases relied on by respondents even raises a federal due process issue.

typically follow in tax cases. Pet. at 7, 9 n.4. In the absence of a meaningful predeprivation remedy, of course, there is no way to ensure that a discriminatory tax is equalized *before* it is imposed. Consequently, a post-deprivation remedy, if it is to adequately correct this timing problem, requires *retroactive* equality in actual taxes paid. *See McKesson,* 496 U.S. at 43 (constitutionally adequate remedy must "bring about the *nondiscrimination* that 'prompt injunctive relief would have achieved' ") (quoting Br. for Resp'ts on Rearg. at 15). That is as self-evidently true for non-Commerce Clause discrimination claims as it is for Commerce Clause discrimination claims.[5]

d. Finally, the State argues, again for the first time in this Court, that the remedy approved below properly takes into account " 'reliance interests [of the State] entitled to consideration.' " State Opp'n at 10 (quoting *James B. Beam Distilling Co. v. Georgia,* 111 S. Ct. 2439, 2448 (1991) (opinion of Souter, J., joined by Stevens, J.)). Whatever the legitimate scope of such reliance interests—an issue not touched on in Justice Souter's opinion, much less in the opinions for the other seven Justices—they have no force here. The discriminatory distinction between railroad property and pipeline property, which was invalidated in this case, was enacted by the Nebraska legislature *after* the State Supreme Court had already held

---

[5] In support of their proposed Commerce Clause limitation on *McKesson,* respondents cite *Bohn v. Waddell,* 807 P.2d 1, 8 (Ariz. Tax 1991), *vacated on other grounds sub nom. Estate of Bohn v. Waddell,* 848 P.2d 324 (Ariz. Ct. App. 1992). The decision is minimally relevant, at best: it hopelessly confuses the remedial thrust of *McKesson* with the separate question of retroactivity; and the appellate court expressly refused to address the remedy issue at all, concluding instead that the plaintiffs had failed to exhaust necessary administrative remedies. It is from that exhaustion ruling that a petition is now pending in this Court in No. 92-1748. Moreover, to the extent that there is language in the lower court opinion in *Waddell* suggesting that *McKesson* only applies to Commerce Clause cases, such language is incorrect.

that this kind of discrimination between the railroads and pipelines was unlawful. See *Northern Natural Gas Co. v. State Bd. of Equalization*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990); *Natural Gas Pipeline Co. v. State Bd. of Equalization*, 466 N.W.2d 461 (Neb. 1991).[6] The Nebraska legislature's recalcitrance undermines any potential equitable argument based on *legitimate* reliance interests.[7]

CONCLUSION

The petition should be granted.

Respectfully submitted,

JOEL I. KLEIN
KLEIN, FARR, SMITH, & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

WILLIAM R. JOHNSON
(Counsel of Record)
KENNEDY, HOLLAND, DELACY & SVOBODA
10306 Regency Parkway Drive
Omaha, NE 68114
(402) 397-0203

May 28, 1993

---

[6] The State points out that the Nebraska Supreme Court also invalidated several other statutory exemptions, *sua sponte*, and, in so doing, "overturned [an earlier] 1974 decision." State Opp'n at 10-11. But, as the court's opinion makes clear, that part of its decision was not the basis for invalidating the tax on petitioners. Indeed, the tax on petitioners had previously been struck down in *Natural Gas Pipeline*, without any consideration of the additional exemptions. The significance of the court's decision to invalidate the additional exemptions in the present case is that it would have allowed a retroactive tax on all exempted property, including that of the railroads, which could have satisfied the *McKesson* requirement. The State Board, however, declined to follow that option on remand.

[7] For essentially the same reason, the State's half-hearted suggestion that *MAPCO I* should not have been given retroactive effect—again, a position that it did not raise below and which actually *contradicts* the judgment below—is meritless.